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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
JAMES ROBERT CAPPS,)
)
Defendant-Appellant.)
_____)

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No. ~~71-0588~~

FILED

JAN 10 1972

APPELLEE'S BRIEF

WM. B. LUCK, CLERK

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
JAMES ROBERT CAPPS,)
)
Defendant-Appellant.)
_____)

No. 71-0583

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

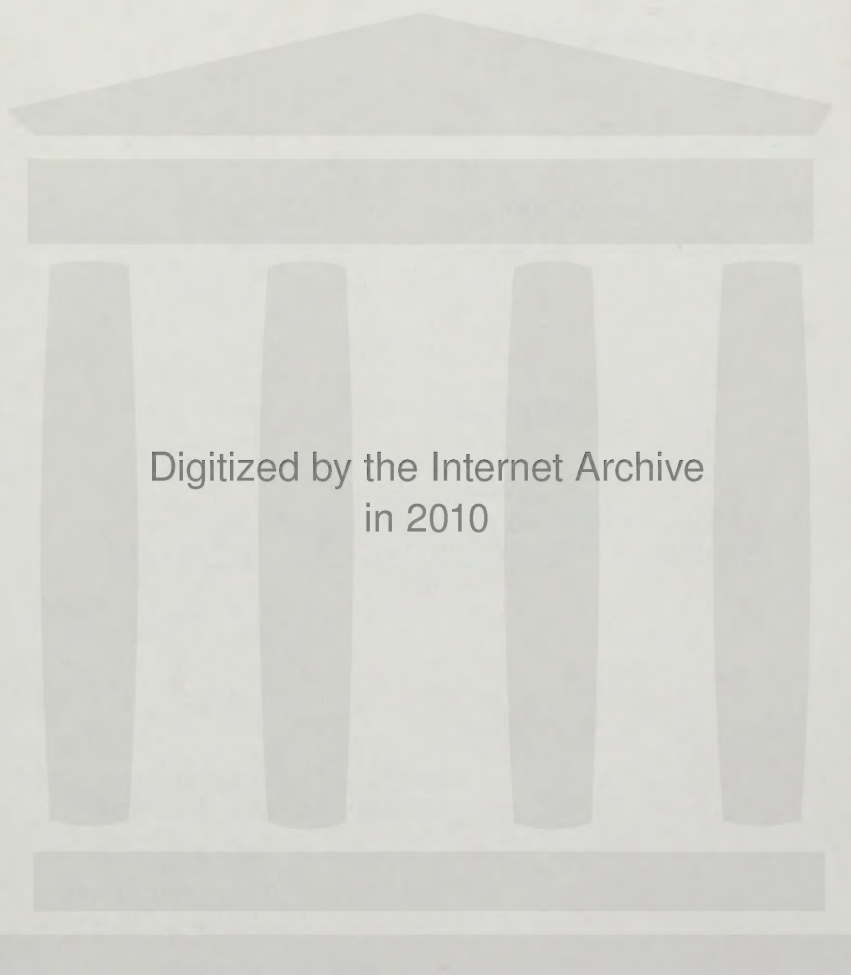
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
JAMES ROBERT CAPPS,)
)
Defendant-Appellant.)

APPELLEE'S BRIEF

I

QUESTIONS PRESENTED

- A. Whether the fortuitous visual discovery of the car's trunk key, lying in plain view under the front seat positioning lever, by a Border Patrolman squatting outside the car to remove the back seat to gain entry into the trunk constitutes the fruit of an illegal search.
- B. Whether the inspection of the shopping bags in the trunk of the car by the Border

Patrolmen, after the odor of marihuana was detected seconds after the trunk lid was opened, constitutes an illegal search.

- C. Whether the totality of direct and circumstantial evidence was sufficient to sustain the conviction for smuggling and transporting marihuana.

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Capps appeals from a judgment of conviction of the offense of smuggling and transporting marihuana in violation of 21 U.S.C. §176a.

B. PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

On June 17, 1971, the appellant was adjudged guilty of smuggling and transporting 84 pounds of marihuana in violation of 21 U.S.C. §176a [R.T. 248], at the conclusion of a court trial which took place on June 16 and 17, 1971, before the Honorable Howard B. Turrentine. Prior to the trial, a hearing was conducted on appellant's motions to suppress the trunk key, the marihuana, for disclosure of informant and for a bill of particulars. The motions were all denied [R.T. 36-39].

On August 30, 1971, appellant was sentenced to be committed to the custody of the Attorney General, or his

authorized representative, for a period of five years on each count, said sentences to run concurrently. The appellant was released on bond pending appeal.

The jurisdiction of the District Court was founded upon 21 U.S.C. §176a and 18 U.S.C. §3231. Jurisdiction of this court is founded upon 28 U.S.C. §§1291 and 1294(1).

C. STATEMENT OF THE FACTS

On February 8, 1971, at about 2:07 a.m., a 1971 Ford two-door car driven by the defendant, with his wife as sole passenger, was stopped at the Immigration checkpoint one mile south of Temecula, California, on Highway 395 [R.T. 47, 49, 160]. The purpose for which the vehicle was stopped was a routine check for illegal entrant aliens [R.T. 46-47, 50, 121]. The Border Patrol agents on duty observed that the car was a rental vehicle [R.T. 16].

Border Patrol Agent Thomas Leupp asked the defendant to open the trunk of the car, but the defendant replied that he didn't have the key and the car had been rented by his brother [R.T. 50]. The vehicle was directed to the secondary inspection area, where Agent Leupp, together with Border Patrol Agent Raymond Penn, told the defendant they were going to remove the back seat of the car and look inside the trunk [R.T. 50]. As the two Border Patrol agents began removing the rear seat, the defendant's wife said "I feel sick" and appeared to have lost color in her face [R.T. 52].

As the seat was being removed, it became apparent a pair of pliers would be needed to remove the bolts which fastened the partition dividing the trunk area of the car from the passenger area [R.T. 53, 109]. Agent Leupp went to get the pliers and Agent Penn remained squatting outside the car on the driver's side [R.T. 109]. As Agent Penn was squatting, his eyes moved in a downward glance toward the highway and fortuitously spotted a key lying below the lever that adjusts the position of the front seat [R.T. 109, 132-135]. The key was lying in the seat well in plain view [R.T. 132-133, 150]. The finding of the key was not the result of a search, visual or physical [R.T. 134-137].

The key was tried in the trunk lock by Agent Penn and it successfully opened the trunk lid [R.T. 53, 109]. A few seconds after the lid was opened, Agent Penn and Agent Leupp detected the odor of marihuana [R.T. 53-54, 109, 140]. Both agents were familiar with the odor of marihuana, having smelled it on other occasions [R.T. 54, 109-110]. The agents then observed five shopping bags in the trunk and looked inside the five bags, finding a total of 38 kilo bricks of marihuana [R.T. 55, 110, 113]. Customs Agent James Farnan testified that in his opinion, based upon extensive past experience, the bricks were wrapped in the common manner in which kilo bricks of marihuana imported from Mexico are wrapped [R.T. 164-165, 175-177]. It was his opinion these bricks came from Mexico [R.T. 165, 177].

Shortly after finding the marihuana bricks, Agent Leupp searched the interior of the car and found a racing tip sheet dated February 7, 1971, for races in Tijuana [R.T. 71-72]. Defendant testified that he and his wife were indeed in Tijuana that evening [R.T. 211]. Also found in the car was a rental agreement with the PHd Corporation for the car the defendant was driving [R.T. 71-72]. Robert Dawson, an employee of PHd, testified that the defendant and his brother-in-law entered the PHd office on January 28, 1971 [R.T. 155]. Mr. Capps was the person who initially sought to rent the car [R.T. 155, 158]. It was only after Dawson noticed that the defendant's license had expired that Donald Harper, brother-in-law of the defendant, presented his own license and signed for the car [R.T. 155, 157]. The rental agreement reflected this on its face, as the defendant's license number had a line drawn through it and Harper's license number was written above it [R.T. 157].

The trial testimony of the defendant, his wife, and Harper conflicted greatly with the testimony of the two Border Patrol agents. The appellant's Statement of Facts reflects the testimony of the defense witnesses.

After hearing all the testimony and observing the demeanor of all the witnesses, the court denied defendant's motion to suppress [R.T. 236-237], as it had done at the suppression hearing, and made its findings [R.T. 245-248].

The defendant was found guilty of both counts of the indictment.

III

ARGUMENT

- A. THE FORTUITOUS VISUAL DISCOVERY OF THE CAR'S TRUNK KEY, LYING IN PLAIN VIEW UNDER THE FRONT SEAT POSITIONING LEVER, BY A BORDER PATROLMAN SQUATTING OUTSIDE THE CAR TO REMOVE THE BACK SEAT TO GAIN ENTRY INTO THE TRUNK DOES NOT CONSTITUTE THE FRUIT OF AN ILLEGAL SEARCH.

Border Patrol agents, acting pursuant to authority granted under 8 U.S.C. §1357 and 8 C.F.R. §287.1, may stop and investigate vehicles for concealed illegal entrant aliens within 100 air miles of the external boundaries of the United States. No showing of probable cause is necessary. United States v. Miranda, 420 F.2d 283 (9th Cir. 1970); United States v. Almeida-Sanchez, ___ F.2d ___ (9th Cir. September 27, 1971), Case No. 26,514.

Since the trunk of a vehicle is a place where aliens can, and often are, hidden, the Border Patrol agents have the right to inspect the trunk of a car for aliens. Fumagalli v. United States, 429 F.2d 1011, 1013 (9th Cir. 1970). Entry into the trunk through the back seat area is permissible when the trunk key is unavailable. In the instant case, involving a two-door car, it was reasonable for the Border Patrol agent to squat outside the car to remove the back seat in order to gain entry into the trunk. Thus, Border Patrol Agent Penn was in a reasonable position at the time the trunk key was

spotted. Since the key was in plain view and was detected, not by a search, but by a mere fortuitous glance, the key was not the fruit of an illegal search.

Contrary to the allegation on page 8 of appellant's brief, Agent Penn did not conduct "a general exploratory search of the front interior of the car" (appellant's emphasis) while Agent Leupp was getting the pliers [R.T. 109, 132-134]. Appellant's brief also alleges, at page 6, that Agent Penn "conducted a manual and visual search of the floorboards, the driver's floor mat, the visors, the front seat, and the area underneath the driver's seat" before finding the trunk key. Agent Penn denied this allegation [R.T. 134].

Contrary to appellant's allegation at pages 6-7 of his brief, the government never made any distinction at the suppression hearing or at trial between "a tactile search and a visual search." The testimony of Agent Penn spoke for itself, and clearly showed that the discovery of the key was not the result of any kind of search, but rather the result of a fortuitous glance.

Having discovered the key, it was then reasonable for the Border Patrol agents to continue the task which they had already commenced (i.e., gaining entry into the trunk) by the most expeditious and logical manner (i.e., using the key to open the trunk lid).

In summary, "[o]bjects falling in the plain view of an officer who has a right to be in the position to have that

view are subject to seizure and may be introduced into evidence." Harris v. United States, 390 U.S. 234, 236 (1968). The trunk key in the case at bar is such an object.

B. THE INSPECTION OF THE SHOPPING BAGS IN THE TRUNK OF THE CAR BY THE BORDER PATROLMEN, AFTER THE ODOR OF MARIHUANA WAS DETECTED SECONDS AFTER THE TRUNK LID WAS OPENED, DOES NOT CONSTITUTE AN ILLEGAL SEARCH.

Immigration officers are designated Customs officers empowered to enforce the Customs laws. Probable cause, however, is necessary to permit them to search areas of vehicles where aliens could not reasonably be expected to be found. Fernandez v. United States, 321 F.2d 283, 286-287 (9th Cir. 1963).

In the case at bar, the smelling of the marihuana odor by two officers familiar with the smell provided the requisite probable cause. Fumagalli v. United States, supra, at p. 1013. The officers even checked each other's evaluation before proceeding with the inspection of the bags [R.T. 140].

Judge Weinberger pinpointed this issue well in United States v. Hartz, 179 F. Supp. 913, 918 (S.D. Cal. 1959):

"We can envision cases where immigration officers searching for aliens come across evidence which gives them probable cause to believe there is a customs violation. For instance, . . . where an immigration officer, upon opening a trunk where an alien might be concealed, smells

an odor which, as a customs officer, he recognizes as that of marihuana."

In the instant case, the trial judge held that the manner in which the marihuana was discovered was not an illegal search.

C. THE TOTALITY OF DIRECT AND CIRCUMSTANTIAL EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION FOR SMUGGLING AND TRANSPORTING MARIHUANA.

On appeal the evidence must be viewed in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Nelson, 419 F.2d 1237, 1242 (9th Cir. 1969). In the instant case the trial judge was also the trier of fact. He heard the evidence, observed the witnesses, and held that no reasonable doubt existed as to the guilt of the defendant.

The court was satisfied that the car was at all times in the appellant's possession. An expert witness testified, stating his opinion as to the country of origin of the kilo bricks of marihuana. It cannot be said that the court abused its discretion by finding the defendant guilty of both the transporting and smuggling counts.

The court did not believe the appellant's testimony that his car had been searched earlier in the evening when he crossed the border at the port of entry. The court also chose to disbelieve the testimony of the brother-in-law, whose testimony conflicted completely with that of the rental agency employee. The trier of fact was not required

2nd Criminal No.
71-2618

IN THE UNITED STATES COURT OF APPEAL
NINTH JUDICIAL CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

JAMES ROBERT CAPPS,

Defendant and Appellant.

Appeal from United States Federal Court,
Southern District of California
Hon. Howard B. Turrentine, Judge.

APPELLANT'S OPENING BRIEF

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1 UNITED STATES COURT OF APPEALS

2 NINTH CIRCUIT

3
4 THE UNITED STATES OF AMERICA, }

NO. 71-2618

5 Plaintiff/Respondent, }

APPELLANT'S OPENING BRIEF

6 vs.

7 JAMES ROBERT CAPPS,

8 Defendant/Appellant. }

9
10 Statement of Facts

11 On the evening of February 7, 1971, defendant JAMES
12 ROBERT CAPPS and his wife went to Tijuana for dinner and the
13 dog races (215/18). They stayed about four hours (211/22)
14 and left about 10:00 p.m. to return to the United States
15 (211/23-25). Authorities at the Mexican-American border
16 stopped the defendant (212/1-3) and asked him to open the
17 car trunk (212/6-7). He did not have the key to the trunk
18 (212/10) because he was not given the key when he borrowed
19 the car (218/5-7). The border agent told the defendant to
20 pull over in the lighted area and step out of the car (212/
21 12-13). The defendant went into a building and was told that
22 the agent was going to search the trunk (213/6-9). After the
23 search the agent told the defendant he could continue into
24 the United States (214/12).

25 Defendant drove to his brother-in-law's house in
26 Clairmont (214/17), parked the car on the street (215/14),

1 and left it unlocked (215/17). Defendant stayed there for
2 two hours (215/25) while his wife slept (216/3).

3 Later the defendant left for Hemet, California, and
4 travelled north on 395 until stopped at the Temecula check
5 point by Agents Leupp and Penn (217/4-6).

6 On February 8, 1971, about 2:00 a.m., Agent Leupp
7 stopped the defendant to determine his citizenship (49/23).
8 Leupp asked the defendant to open the car trunk. He said he
9 could not because he did not have the trunk key (50/9). He
10 said his brother-in-law, Donald Harper, had rented the car
11 (50/15-16). Harper said he rented the car (188/13 19) and
12 loaned it to the defendant the evening before his arrest
13 (189/9) but did not give him the trunk key because he did not
14 have it (189/10 14). Robert Dawson of PHD Car Rental said
15 Harper signed for the car (157/24-25), was the lessee (159/
16 1-4) and paid all the charges (159/17-19).

17 Penn came to the car and told the defendant he and
18 Leupp were going to take the back seat out of the car to look
19 in the trunk (50/17-19). Leupp and Penn removed the lower
20 portion of the back seat of the vehicle (109/2 3). Penn told
21 Leupp he needed pliers to take out the upper portion of the
22 seat (109/3-5).

23 Leupp went for pliers, Penn stayed in a stooped posi-
24 tion outside the car along the driver's side of the front
25 seat (109/6-8). Penn looked on the floorboards (221/23-24),
26 slipped his hand underneath the back, around and underneath

1 the front and along the side (222/2-4). He got inside and
2 searched the floorboard area of the front seat (222/5-8). He
3 looked under the driver's floor mat (222/13-14), looked on
4 the visors (222/21) and ran his hand across the front seat in
5 the crack between the seat (222/23 - 223/2). At some point
6 in his "search" he found the key under the front seat (102/
7 8-10). The key was below the lever which moves the seat on
8 the slant of the well in which the seat sits (132/25, 133/1 2).
9 When Penn found the key he told Leupp he found the key "under
10 the driver's seat where it always is" (136/3-6). Penn said
11 other times he looked for keys under the driver's seat before
12 entering the trunk (120/23-24).

13 The agents used the key to open the vehicle trunk (137/
14 10-13). When Penn opened the trunk he saw some shopping bags
15 (137/21-23). He thoroughly looked on both sides of the trunk,
16 in the back near the rear seat and over the whole area but
17 found no aliens (138/21-25, 139/1).

18 Penn asked the defendant about the shopping bags and
19 said "What's in them?" (226/21). The defendant replied, "I
20 don't know what's in them, they're not mine." (226/21-22).
21 Penn said to the defendant, "Why don't you open one up?....
22 Come on, open one up, it's okay." (227/4-6).

23 Penn thought he smelled marijuana five to ten seconds
24 after he opened the trunk (139/14-18). The record shows in
25 the minute or two after the agents opened the trunk neither
26 of them said anything about a marijuana smell (228/7-10).

1 They allegedly smelled it after they dumped out one of the
2 bags (228/16-17). Penn asked Leupp, "Hey, what does that
3 smell like to you?". Leupp said it smelled like marijuana
4 (140/18-24). They opened the bags, which contained 38 kilo-
5 grams of marijuana wrapped in different color paper and
6 cellophane (111/3-9). The defendant was charged with two
7 counts of "smuggling" and "transporting" marijuana under
8 Section 21 U.S.C. 176(a).

9 The Court denied the defendant's motions to suppress
10 the evidence both at pre-trial and when renewed at trial (235,
11 236, 237). The Court denied defendant's motion for judgment
12 of acquittal under 18 U.S.C 29(a) (182/3 4). The Court con-
13 victed JAMES ROBERT CAPPS of both counts.

14 /////

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THE IMMIGRATION SEARCH WAS NOT AUTHORIZED BY STATUTE NOR SUPPORTED BY PROBABLE CAUSE AND WAS AN UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT.

A. Immigration Agent Penn's visual search of the area beneath the vehicle's front seat was not a search for aliens under 8 U.S.C. 1357(a), nor a search under the "Plain View Doctrine".

8 U.S.C. 1357(a) authorized Immigration Officers to stop and to make warrantless vehicle searches for concealed aliens and to check citizenship. This section only allows a search for concealed aliens. It does not permit a general exploratory search of the vehicle's interior in areas where aliens could not be concealed. Roa-Rodriguez v. U.S., 410 F2d 1206 (1969). Since Contreras v. U.S., 291 F2d 66 (1961), the principle is clear:

"If the search cannot be justified as a reasonable means of determining the citizenship status of the car's occupants, it can not be justified in any other way under the rubric of "probable cause"." (p. 66)

The cases are clear. There must be a logical connection between the search and the desire to check citizenship or look for concealed aliens.

In Valenzuela-Garcia v. U.S., 425 F2d 1170 (1970), Immigration Agents inspected a car trunk and found marijuana in a six to eight inch space between the interior trunk panel and the interior fender wall. The Court said the evidence was inadmissible because it was:

1 "...Unlikely that the inspector in our
2 case could have maintained any reasonable
3 belief that an alien was secreted in the
4 six or eight inch space between the trunk
5 panel and car wall." (p. 1172)

6 Penn conducted a manual and visual search of the front
7 floorboards, the driver's floor mat, the visors, the front
8 seat, and the area beneath the driver's seat. Surely he
9 could not honestly believe an alien was under the mat, on the
10 visor, in the crack between the seat, or in the narrow space
11 between the bottom of the front seat and the car floor. A
12 fair reading of the cases suggests that he got the key from
13 an area where the law says he cannot search. The law does
14 not permit him to use the object of an "illegal search" to
15 further search the trunk.

16 In U.S. v. Hartz, 179 F Supp. 913 (1959) an immigration
17 officer saw a cigarette package wedged between the upper and
18 lower portions of the front seat. He opened it and found
19 marijuana cigarettes. The Court would not admit them into
20 evidence and said:

21 "A bona fide search for aliens as we view
22 it involves looking in places where an
23 alien might be concealed." (p. 917)

24 To justify the key's use in our case the Government
25 makes a tenuous distinction between a tactile search and a
26 visual search. The Government seems to say the "visual"
27 search of an impermissable area is not a search precluded by
28 Roa-Rodriguez, Contreras, and Valenzuala-Garcia, supra. Yet
29 the Government concedes that a "manual" search of the same

1 area requires probable cause.

2 Hortz, supra, describes a "manual" intrusion into an
3 unauthorized area and uses the verb "looking" to relate the
4 event and shows the general every day language blend of the
5 two senses.

6 U.S. v. Winer, 294 F Supp 731 (1969) uses the same
7 semantic indicator. Winer found marijuana inadmissable when
8 an Immigration Inspector reached (manually) under the front
9 seat of the vehicle after he saw the passenger bend toward
10 the base of the seat. Winer says about the sentient nature
11 of the search:

12 "However, it is neither reasonable nor
13 realistic to say that when he (Immigra-
14 tion Officer) looked under the seat of
the small Opel Kadette that he was
looking for aliens." (p. 734) (emphasis added)

15 And about the search's legality:

16 "Since it was the search under the seat
17 that produced the contraband, the Govern-
18 ment may not rely on the statutory
19 authority of 8 U.S.C. 1357(a) to establish
20 that that portion of the search was reason-
21 able." (p. 734) (emphasis added)

22 Penn bent down and looked under the front seat. The
23 area where the key was could not be higher than two feet from
24 the ground. The space between the seat's bottom and the
25 floor was at best an inch or two in height. To see the key
26 Penn had to bend down, crouch and look and feel beneath the
driver's seat.

He and Leupp had stopped trying to remove the rear
seat while Leupp went to look for pliers. Harris v. U.S.,

390 U.S. 234 (1968) states the "Plain View" doctrine:

"Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." (emphasis added)

"Right to be in the position" is critical to an analysis of Penn's act. When he saw the key he had stopped his allegedly alien-related seat removing activities. He stopped facing the rear seat and looking toward the rear of the vehicle. He then began a general exploratory search of the front interior of the car. Since he was no longer facing or looking in a direction he had a legal right to do, anything he saw was not in "plain view". The normal probable cause requirements would apply to his search.

Penn said other times he had looked for and found keys under the driver's seat. His testimony at least suggests a predisposition to incorporate a visual search into his alien inspection "routine". Prior "illegal" searches cannot justify his search beneath the seat because he had no "right to be in the position" he was when he found the key.

B. The search of the shopping bags in the car trunk was not a search for aliens under 8 U.S.C. 1357(a) nor a search under the "Plain View Doctrine".

Assuming from the prior discussions that Penn got the trunk key in a legally permissible way, he exceeded the scope of an alien search when he searched the trunk. After he saw the shopping bags he looked carefully in the trunk and saw

1 no aliens. He returned to the bags and after some dialogue
2 opened one.

3 Valenzuela-Garcia, Hortz and Winer, supra, allow a
4 search where aliens might be concealed. Only Gulliver might
5 have believed Lilliputians were hiding in the shopping bags.
6 Surely Penn could not have reasonably believed there were
7 aliens in the bags. To search the shopping bag is to prosti
8 tute the clear requirements of Valenzuela-Garcia, Hortz and
9 Winer. If Penn's search was not bad by how he found the key
10 it became "illegal" when he and Leupp opened one of the
11 shopping bags.

12 II

13 THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN
14 A CONVICTION ON EITHER THE SMUGGLING OR
TRANSPORTATION CHARGES.

15 A. To convict under 21 U.S.C. 176(a) the
16 Government must prove beyond a reason-
17 able doubt that the marijuana actually
came from another country.

18 In U.S. v. Meyer, 432 F2d 1000 (1970), the defendant
19 was arrested with five large boxes of sodium seconal capsules.
20 The words "Mexico, D. F." (Department Federal) were on the
21 outside of four. Meyer says:

22 "The most that can be inferred from this
23 evidence is that the four boxes probably
24 came from Mexico. Whether the boxes con-
25 tained the seconal capsules when brought
26 into the country and whether the seconal
capsules were illegally imported are
matters of pure conjecture."

Agents Farnan and Leupp testified about the contraband's

1 origin. Leupp's opinion was that the packages were from
2 Mexico. He based his opinion on the type and color of wrap-
3 ping paper. Though Leupp knew about kilo packaging he said
4 he had never seen kilos wrapped in the United States, South
5 America, Middle East, or the Far East. He only knew about
6 one type of wrapping and based his opinion on that.

7 Here the marijuana was wrapped in different color paper
8 and cellophane. At best this may show that the paper and
9 cellophane came from Mexico. Whether someone illegally im-
10 ported the papers' contents or wrapped the kilos in the paper
11 before they were found in the United States or illegally im-
12 ported their contents is pure conjecture.

13 Farnan also said he could not rule out the fact that
14 the marijuana was grown and packaged in kilo form in the
15 United States. He said he did not know how kilos of marijuana
16 were wrapped in the United States.

17 Both agents based their opinions about the marijuana's
18 origin by how it was packaged. While their testimony allows
19 an inference that the marijuana was of Mexican origin, it
20 falls far short of proof beyond a reasonable doubt.

21 In Buelna-Mendoza v. U.S., 435 F2d 1386 (1971), the
22 Court upheld a conviction of illegal importation. In Buelna
23 an agent testified it was his opinion that the marijuana was
24 from Mexico. He based his opinion on the size and form of
25 the kilo bricks and on the baby powder which covered the
26 kilos. He said the baby powder was significant because one

1 week before someone discovered marijuana from Mexico covered
2 with baby powder. Caudillo v. U.S., 253 F2d 513 (1958), said
3 that unmanicured or rough marijuana, marijuana with seeds and
4 leaves, was more likely than not to come from Mexico.

5 Here the opinions of Leupp and Farnan lack the dis-
6 tinguishing features of Buelna (baby powder) and Caudillo
7 (unmanicured marijuana). The record is clear: The agents'
8 opinions were without adequate foundation. The Government
9 did not prove the contraband's origin beyond a reasonable
10 doubt.

11 B. Since the Government failed to
12 sustain their burden of proof that
13 the appellant knew that the mari-
14 juana had been imported or brought
15 into the United States contrary to
16 law or that he knowingly transported
the marijuana, it was prejudicial
error to deny appellant's 18 U.S.C.
29(a) motion for judgment of acquittal
as to both charges.

17 Knowledge is an essential element in both charges
18 against the defendant. The Court must acquit unless the
19 Government proves "knowledge" beyond a reasonable doubt.

20 The Government showed only that the defendant was
21 driving a car with marijuana in the trunk when the Immigration
22 Inspectors stopped him near the Temecula, California, check
23 point. Since Leary v. U.S., 395 U.S. 6, 89 S.Ct. 1532, 23
24 L.Ed. 2d 57 (1969), proof of possession is no longer enough
25 to infer knowledge of importation or transportation. Prior
26 to Leary, supra, the statutory language was:

1 "Whenever on trial for a violation of
2 this subsection the defendant is shown
3 to have or to have had the marijuana
4 in his possession, such possession
5 shall be deemed sufficient evidence to
6 authorize conviction unless the defen-
7 dant explains his possession to the
8 satisfaction of the jury."

9 Since Leary, supra, the Government must prove by direct
10 or circumstantial evidence the knowledge required for convic-
11 tion under 21 U.S.C. 176(a). The Government no longer can use
12 the presumption to bypass proof of substantial elements of the
13 offense, and create the serious risk that the issue of guilt
14 or innocence may not have been reliably determined. (U.S. v.
15 Scott, p. 59 425 F2d 55 (1970).

16 In U.S. v. Buck, 425 F2d 726 (9th Cir.), the defendant
17 was driving a car whose trunk contained marijuana. There was
18 some evidence in Buck, supra to infer that the marijuana was
19 in the United States contrary to law. Buck reversed the con-
20 viction because there was insufficient evidence plus the
21 invalid statutory presumption of knowledge of unlawful impor-
22 tation.

23 In our case the defendant at all times said he knew
24 nothing about the marijuana. Nothing by his conduct, actions,
25 or emotions suggested he knew the marijuana was in the trunk
26 of someone else's car before the immigration agents found it.
Leupp and Penn testified at the trial that Mr. Capps said he
knew nothing about the shopping bags or their contents. They
said he refused to open them because he said they were not his.

1 The Government failed to meet the proof standard of
2 "knowledge" or "importation". There is no showing the defen-
3 dant "knew" the marijuana was illegally imported if it was.
4 There is no showing the marijuana was "imported" from anywhere
5 except Penn's vague "opinion". The record shows the reverse:
6 Authorities stopped and searched the trunk at the Mexican
7 American border. They let the defendant proceed into the
8 United States. The car was parked for two to three hours in
9 San Diego and stopped at the Temecula checkpoint approximately
10 four hours after the border crossing.

11 The evidence shows the defendant drove a car someone
12 else rented whose trunk authorities searched at the border
13 some four hours before the Temecula stop. The defendant and
14 his wife said they did not bring marijuana into the United
15 States from Mexico and told about the border search. Defen-
16 dant said he knew nothing about the shopping bags, how they
17 got in the trunk or their contents.

18 On the "smuggling" charge the Government failed to
19 prove beyond a reasonable doubt the two critical elements,
20 "knowledge" and "importation".

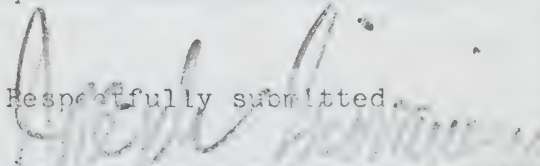
21 The "knowledge" proof in the "transportation" charge
22 is weak, too. In U.S. v. Mollat, No. 71-2359 (1971), a recent
23 Ninth Circuit decision, this Court reversed a marijuana trans-
24 portation conviction because the evidence did not show "know-
25 ledge" of importation from Mexico. This Court held the "smell
26 of gasoline and an aerial map of a portion of Mexico found in

1 the airplane was not enough to sustain a conviction beyond a
2 reasonable doubt. The evidence shows the defendant did not
3 "know" the marijuana was in the trunk. He knew he and his
4 wife did not bring marijuana into the United States from
5 Mexico because the authorities searched the car trunk when he
6 and his wife returned from dinner and the dog races.

7 The evidence in our case shows the defendant did not
8 "import". The Government did not prove the defendant knew
9 the marijuana was illegally imported, nor did the Government
10 prove beyond a reasonable doubt that he "knew" the marijuana
11 was in the trunk. In fact, the defense proved the reverse.
12 Had the Government proved the defendant tried to escape when
13 stopped to have his car checked at the border (U.S. v. Carter,
14 437 F2d 10811) or drove in a circular route with a heavy load
15 in the trunk and admitted he thought marijuana might be in
16 the trunk (Buelna Mendoza v. U.S., 435 F2d 1386), or sought
17 and made contact with a known marijuana dealer in Mexico (U.S.
18 v. Holstein, 435 F2d 144) there might have been some "know-
19 ledge" inference to support a "transportation" conviction.

20 The "importation" element to support a smuggling con-
21 viction is not just insufficient but absent. The "knowledge"
22 element of both charges was insufficiently proved.

23 Counsel respectfully requests this Court to reverse
24 both convictions.

25 Respectfully submitted,
26 

JOSEPH GIOVANNETTI, Lawyer for
Defendant/Appellant.

1 PROOF OF SERVICE BY MAIL

2
3 STATE OF CALIFORNIA }
4 COUNTY OF LOS ANGELES } ss.

5
6 I am a citizen of the United States and a resident of
7 the state and county aforesaid: I am over the age of eighteen
8 years and not a party to the within entitled action: my
9 business address is The Penthouse, 405 North Bedford Drive,
10 Beverly Hills, California, 90210.

11 On December 7, 1971, I served the within APPELLANT'S
12 OPENING BRIEF on the attorney for plaintiff in said action by
13 placing a true copy thereof enclosed in a sealed envelope with
14 postage thereon fully prepaid in the United States mail at 405
15 North Bedford Drive addressed as follows:

16 United States Attorney
17 Southern District of California
18 301 United States Courthouse
19 San Diego, California 92101.

20 I certify (or declare), under penalty of perjury, that
21 the foregoing is true and correct.

22 Executed on December 7, 1971, at Beverly Hills, Cali-
23 fornia.

24
25
26
SUZANNE R. FISCHER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I am a citizen of the United States and a resident of the state and county aforesaid: I am over the age of eighteen years and not a party to the within entitled action: my business address is The Penthouse, 405 North Bedford Drive, Beverly Hills, California, 90210.

On December 7, 1971, I mailed for filing the within original and twenty-four (24) copies of APPELLANT'S OPENING BRIEF in said action to the United States Court of Appeals by placing the afore-said true original and copies in a sealed envelope with postage thereon fully prepaid in the United States mail at 405 North Bedford Drive addressed as follows:

United States Court of Appeals
Ninth Judicial Circuit
Office of the Clerk
7th and Mission Streets
Post Office Box 547
San Francisco, California 94101.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 7, 1971, at Beverly Hills, California.

SUZANNE R. FISCHER

1 UNITED STATES COURT OF APPEALS

2 NINTH CIRCUIT

3
4 THE UNITED STATES OF AMERICA,
5 Plaintiff/Respondent,
6 vs.
7 JAMES ROBERT CAPPS,
8 Defendant/Appellant.
9

NO. 71-2618

ADDENDUM TO APPELLANT'S
OPENING BRIEF

10 STATEMENT OF BAIL STATUS

11 The Defendant/Appellant JAMES ROBERT CAPPS is currently
12 on bail in the amount of FIVE THOUSAND DOLLARS (\$5,000.00),
13 Bond Number 1-78458, Genie Bail Bonds, San Diego, California,
14 pending this appeal.

15 December 9, 1971.

Joseph Giovanazzi
16 JOSEPH GIOVANAZZI, Lawyer
17 for Defendant/Appellant

18 I certify under penalty of perjury that this ADDENDUM
19 TO APPELLANT'S OPENING BRIEF was mailed on December 9, 1971,
20 to the United States Attorney, Southern District of California,
21 301 United States Courthouse, San Diego, California, 92101.

22 Executed on December 9, 1971, at Beverly Hills, Cali-
23 fornia.

Suzanne R. Fischel
24 SUZANNE R. FISCHEL
25
26

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 71-2616
)	
FIDEL RODRIGUEZ)	
)	
Defendant-Appellant.)	
)	

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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No. 71-2616

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
FIDEL RODRIGUEZ,)
)
Defendant-Appellant.)
_____)

APPELLEE'S BRIEF

I

QUESTIONS PRESENTED

1. Whether the officer, when armed with information regarding marihuana and narcotics trafficking activities at the residence under surveillance and after having observed the appellant's activities at the residence, was justified in stopping and detaining the appellant for the purpose of investigating the possibility of his having delivered narcotics or marihuana.

2. Whether the initial stopping was justified.

3. Whether the detention of the appellant until Officer Demerjian was able to investigate the circumstances at the Jaimes' house was unreasonable and did not constitute an arrest.

4. Whether the evidence that the defendant was involved in the transportation and delivery of 18 kilos of marihuana with the same pickup truck in the Los Angeles area two months prior to his arrest for smuggling and transportation of 251 pounds of marihuana was admissible as a prior similar act.

5. Whether the trial court committed plain error when on voir dire it asked any jury member to excuse themselves if they had a bias against Mexican people or if they used marihuana.

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a judgment of the United States District Court for the Southern District of California, the Honorable J. Clifford Wallace presiding.

The judgment was entered following a jury trial in which appellant was found guilty of one count of conspiracy to smuggle marihuana, and one count of transportation of marihuana, both in violation of 21 U.S.C. §176a.

The jurisdiction of the United States District Court was founded on 18 U.S.C. §3231. The jurisdiction of the Ninth Circuit Court of Appeals is based upon 28 U.S.C. §§1291, 1294(1).

B. PROCEEDINGS AND DISPOSITION IN THE LOWER COURT

On December 17, 1969, the Grand Jury for the Southern District of California returned Indictment No. 7738 Criminal charging appellant and codefendant Mario Lopez Proa with three counts in violation of 21 U.S.C. §176a (Clerk's Record on Appeal [hereinafter referred to as "C.R."] p. 1).

Count one charged them with conspiracy to smuggle 251 pounds of marihuana; count two charged them with smuggling 251 pounds of marihuana; and count three charged them with transporting 251 pounds of marihuana (C.R. 1).

The violations charged in all counts were alleged to

have occurred on or about December 13, 1969, within the Southern District of California (C.R. 1).

On February 13, 1970, appellant was tried on this indictment and convicted of the conspiracy and transportation counts and acquitted of the smuggling count.

In a judgment filed March 19, 1971, this court reversed the conviction of Rodriguez on the ground that the trial court had unduly limited defense counsels cross-examination of the cooperating codefendant. United States v. Rodriguez, 439 F.2d 782 (9th Cir. 1971).

Appellant's retrial, before the Honorable J. Clifford Wallace, resulted in a second conviction on both counts on July 26, 1971 (C.R. 49).

On August 23, 1971, the appellant was sentenced to the custody of the Attorney General for imprisonment for a period of seven and one half years on count one and five years on count two to run concurrently (C.R. 70).

On August 24, 1971, appellant filed a notice of appeal (C.R. 66). On August 31, 1971, Judge J. Clifford Wallace granted the order permitting the appeal in forma pauperis and appointed Federal Defenders of San Diego, Inc. to represent appellant on appeal (C.R. 72).

C. STATEMENT OF THE FACTS

On December 13, 1969, at about 12:30 p.m., Mario Proa entered the United States from Mexico at the Port of Entry

Tecate, California (Record of Trial [hereinafter referred to as "R.T."] pp. 58, 75). Proa was the driver and sole occupant of a 1961 Ford Pickup with a camper installed (R.T. 58). Proa was referred to the secondary inspection area and placed under arrest after 114 kilo packages of marihuana were found concealed under the bed which was inside the camper (R.T. 76-77).

Mario Proa testified as a witness for the government. Proa had known the appellant, Fidel Rodriguez, for 10-11 years (R.T. 83). Approximately one week before the arrest appellant went to Proa's house and said that he had an easy job for Proa and that he would pay him \$100 (R.T. 90). Appellant indicated that he wanted Proa to bring marihuana into the United States (R.T. 96). On December 12, 1969, Proa went to the appellant's house in National City (R.T. 85, 99). From appellant's house, the appellant and Proa drove to Mexico and arrived in Mexicali about 9:30 p.m. (R.T. 101). Appellant gave Proa \$10 and told him to wait in a bar (R.T. 104). About 2:00 a.m., December 13, 1969, appellant returned to the bar for Proa (R.T. 104). Appellant and Proa then slept in the camper truck until 7:30 or 8:00 a.m. that morning (R.T. 105). About 9:30 a.m., they drove from Mexicali to Tecate (R.T. 106). Appellant got out of the truck at Tecate and Proa was to drive the truck across the border and meet appellant at a market (R.T. 109). Proa was then arrested as he crossed the border.

The truck which Proa was driving belonged to appellant (R.T. 111).

During the trial, evidence was introduced as to a prior similar act by the appellant. A hearing was held outside the presence of the jury to determine if any of the defendant's constitutional rights were violated during the arrest for the prior similar act (R.T. 159-184). The following facts were elicited at that hearing and during the trial:

On October 16, 1969, at approximately 4:00 p.m., Deputy Daniel Demerjian and other officers of the Narcotics Division of the Los Angeles County Sheriff's Department had the residence of the Jaime family under surveillance (R.T. 167-168, 171). The surveillance was initiated because the officers had a search warrant for the residence and they had received information that the Jaimes were involved in the sale and distribution of marihuana in kilo quantities, that they were involved in the sale of cocaine and heroin, and that they were bringing the narcotics and contraband into the East Los Angeles area from Mexico (R.T. 169). Also, Deputy Demerjian had personally monitored two phone calls by an informant to

the Jaime's residence in which Jaimes said that they had access to kilo bricks of marihuana and that the kilos would be there when the informant wanted to pick them up (R.T. 170). During this surveillance on October 16, 1969, Deputy Demerjian observed a green Ford Pickup truck drive up and park adjacent to the driveway leading to the Jaime's residence (R.T. 171). The truck contained a male, who was the driver, and two females (R.T. 171). All three got out and walked into the Jaime residence (R.T. 171). A short time later, the driver and another male came out of the house. The driver entered the pickup truck and the other male looked up and down the street as if he were looking for someone or something (R.T. 171-172). The other male then directed the driver of the pickup to back the truck down the driveway and into the garage (R.T. 172). Several minutes later the driver drove the pickup out of the garage and again parked it on the street (R.T. 172). The driver and the other male then went back into the house. Several minutes later the driver and two females left the house and got into the

pickup and drove away (R.T. 172). Deputy Demerjian had asked that the pickup truck be checked with the local Department of Motor Vehicles' files over the police radio and he received a response that it was not in the local files (R.T. 173). Therefore, the deputy felt that the truck was from out of town (R.T. 173). Based on what he had observed, Deputy Demerjian felt that there had been some contraband transported to the Jaime residence and left there by the pickup truck (R.T. 174). Deputy Demerjian followed the truck and stopped it four or five blocks from the Jaime residence (R.T. 174). The deputy requested some identification from the driver of the vehicle and gave this information to another officer and asked him to run a record and want check on the driver (R.T. 174). While at that location, Deputy Demerjian observed a wheel in the bed of the pickup truck (R.T. 174-175). The main portion of the carcass of the tire appeared to have been cut away (R.T. 175). Deputy Demerjian also looked underneath the bed of the pickup truck where a spare tire is generally kept,

and he didn't observe any tire in the spare tire rack (R.T. 175). The driver stated that he found the wheel on the freeway. After two or three minutes at the location of the pickup truck, Deputy Demerjian received a radio message to return to the Jaime residence to execute the search warrant (R.T. 175, 206). Deputy Demerjian had the search warrant in his possession (R.T. 175). He left the area, leaving another police officer there, and proceeded back to the Jaime residence where the search warrant was executed (R.T. 175). Deputy Demerjian assisted in the search of the garage and observed the carcass of a tire that appeared to have been cut from the rim (R.T. 178, 196). There was marihuana debris adhering to the inside rubber portion of the tire (R.T. 178). He also observed 18 kilos of marihuana lying almost directly alongside of the tire carcass (R.T. 175). Also on the floor of the garage was some marihuana debris (R.T. 175-176). He also observed that the outer portions of some of the kilo packages had dark black markings that resembled the inside ridges on the carcass of the tire and also resembled the ridges that he had observed in the wheel or rim that was

in the pickup truck bed (R.T. 176). Deputy Demerjian then returned to where the pickup truck was stopped and placed the driver and occupants under arrest and seized the wheel which was in the bed of the pickup (R.T. 176, 197). The driver of the pickup truck was the appellant (R.T. 176). The pickup truck was the same one which Mario Proa was driving when he was arrested on December 13, 1969 (R.T. 179).

III

ARGUMENT

- A. ARMED WITH INFORMATION REGARDING MARIHUANA AND NARCOTICS TRAFFICKING ACTIVITIES AT THE RESIDENCE UNDER SURVEILLANCE AND AFTER HAVING OBSERVED THE APPELLANT'S ACTIVITIES AT THE RESIDENCE, THE OFFICER WAS JUSTIFIED IN STOPPING AND DETAINING THE APPELLANT FOR THE PURPOSE OF INVESTIGATING THE POSSIBILITY OF HIS HAVING DELIVERED NARCOTICS OR MARIHUANA.
-

1. THE INITIAL STOPPING WAS JUSTIFIED

At the time the appellant was stopped, Officer

Demerjian had personal knowledge of the following facts:

(a) He had in his possession a search warrant

for the Jaime residence.

(b) He had personally monitored telephone

calls to the Jaime residence in which Jaimes stated that they had kilo bricks of marihuana available at anytime the

informant wanted to pick them up.

(c) He had information that the Jaimes were involved in the sale and distribution of marihuana in kilo quantities and also in the sale of cocaine and heroin.

(d) He observed the appellant drive up to the residence in a pickup, park on the street, and go inside the residence.

(e) He discovered that the pickup truck was not registered with the local Department of Motor Vehicles. He observed appellant and an unknown man come out of the house a short while later.

(f) He observed the unknown man look up and down the street and then direct appellant to back up his pickup into the garage.

(g) He observed the appellant drive the pickup out of the garage approximately five minutes later.

(h) Appellant drove off shortly thereafter.

It is a reasonable inference that the purpose of driving a pickup into a garage for only five minutes was to load or unload something from the pickup. Adding to this the knowledge of the activities at this residence and the fact that the unknown man looked up and down the street before directing the truck into the garage, it was also reasonable to suspect that they were loading or unloading marihuana or narcotics from the pickup.

The Trial Court stated (R.T. 183):

"The officer certainly had sufficient reason to detain, to stop the defendant. He would have been derelict in his duties if he hadn't."

There may have been probable cause to arrest the appellant at the time of the initial stopping, but even if there wasn't probable cause for an arrest, the officer was still justified in making the stop in order to investigate the appellant's suspicious activities. See Terry v. Ohio, 392 U.S. 1 (1967).

There is no doubt that the appellant's liberty of movement was restricted from the time that his vehicle was initially stopped by Officer Demerjian. However, it is not every such restriction which amounts to an arrest or an unlawful detention. See for example Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), where it was held proper for the police to stop defendant for routine investigation when police noticed defendant drive by at inordinately slow speed several times during pre-dawn hours.

The Court in Wilson v. Porter further held:

"[T]here is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of

routine police investigation. [Citations]
A line between reasonable detention for routine investigation and detention which could be characterized as capricious and arbitrary cannot neatly be drawn. But due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing."

Wilson v. Porter was cited with approval in United States v. Jackson, 423 F.2d 506, 508 (9th Cir. 1970), cert. denied, 400 U.S. 823 (1970). See also United States v. Brown, 436 F.2d 702 (9th Cir. 1970), and United States v. Oswald, 441 F.2d 44 (9th Cir. 1971), United States v. Zubia-Sanchez, ___ F.2d ___, (9th Cir. Sept. 22, 1971).

2. THE DETENTION OF THE APPELLANT UNTIL OFFICER DEMERJIAN WAS ABLE TO INVESTIGATE THE CIRCUMSTANCES AT THE JAIMES' HOUSE WAS NOT UNREASONABLE AND DID NOT CONSTITUTE AN ARREST.

The test to be applied to determine if the detention

was reasonable was set forth by this court in Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967).

"The reasonableness of such on-the-scene detention is determined by all the circumstances. The seriousness of the offense, the degree of likelihood that the person detained may have witnessed or been involved in the offense, the proximity in time and space from the scene of the crime, the urgency of the occasion, the nature of the detention and its extent, the means and procedures employed by the officer, the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant--these and other facts will be relevant in balancing the need for limited on-the-scene detention and inquiry against the inconvenience and indignity to the individual detained."

Applying the tests of Arnold, supra, to the facts of this case we find that the suspected crime involved either marihuana or narcotics and therefore was a serious crime. There was a very high likelihood that the appellant may have witnessed or been involved in the offense. The stop and detention was only four or five blocks from the house and was within a few minutes after appellant left the house, so

it was close in both time and distance. The urgency of the occasion is very important here because the appellant was driving a vehicle and was apparently not from that area. Therefore if he were not detained he would obviously continue driving away. This would make it very difficult or impossible to locate the appellant later and it would certainly give the appellant an opportunity to get rid of any incriminating evidence such as the wheel.

The nature of the detention was certainly reasonable in that the appellant was merely waiting in his car until the officer returned. The extent of the detention, which is just one of the factors to consider, was reasonable under the circumstances. Deputy Demerjian was only at the stop two or three minutes when he was called back to execute the search warrant. After discovering the additional evidence in the garage he returned to where appellant was stopped and placed him under arrest. The means and procedures used by the officers were certainly reasonable. They did nothing but make the appellant wait. There was no deliberate effort to avoid securing a warrant. First of all, there was no search involved of any property belonging to the appellant. The officers could have waited and secured an arrest warrant, but at the time they determined the defendant should be arrested. They knew the importance of the wheel in the back of the defendant's truck, and it would have been poor police procedure if they

had given the appellant the chance to destroy the evidence. There certainly was no harassment of the appellant. There was no search of the appellant or his vehicle, there was no interrogation and the appellant did not have to do anything except wait in his vehicle.

The need for this limited on-the-scene detention was great, as shown by the above factors. In addition, it is pointed out that this was a situation in which there was a very strong suspicion that the defendant left something at the Jaime house. Inasmuch as he was stopped only four or five blocks away, it was perfectly reasonable for the officer to go to that house and ascertain if there was any evidence that the appellant was involved in the delivery of marihuana or narcotics. At the very least, the appellant was a witness as to what was located in the house and the garage just prior to the execution of the search warrant.

The inconvenience and indignity to the appellant was small. This is particularly true when compared with the indignity involved in Terry v. Ohio, supra. In that case the defendant was subjected to a frisk and pat down for weapons on a public street, and The Supreme Court stated at page 24-25 that even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

Even though the indignity was much greater in Terry than in the instant case, the detention and the pat down were upheld.

- B. EVIDENCE THAT THE DEFENDANT WAS INVOLVED IN THE TRANSPORTATION AND DELIVERY OF 18 KILOS OF MARIHUANA WITH THE SAME PICKUP TRUCK IN THE LOS ANGELES AREA TWO MONTHS PRIOR TO HIS ARREST FOR SMUGGLING AND TRANSPORTATION OF 251 POUNDS OF MARIHUANA WAS ADMISSIBLE AS A PRIOR SIMILAR ACT.

Appellant contends that the prior act is not admissible because it is not similar enough and is therefore distinguishable from United States v. Anthony, 444 F.2d 484 (9th Cir. 1971), and United States v. Theobald, 371 F.2d 769 (9th Cir. 1967).

The government would submit that this act is very similar. It involved the same vehicle in the transportation and delivery of a commercial load of marihuana just two months before. Regardless of how similar the acts are, it is not required that they be exactly the same. See United States v. Theobald, supra, at page 771 where the court states:

"The requirement that other offenses sought to be proved be similar to the offense charged applies only where the likeness gives the evidence its probative value--as where the repeated commission by the accused of crimes similar to that charged is offered to prove intent by negating the possibility of innocent mistake."

The Theobald case was the exact same factual situation as the instant case. In both cases there was a cooperating codefendant who testified that he smuggled the marihuana into the United States at the request of the person on trial. In both cases the person on trial had an alibi. In Theobald the prior act was a conversation "very close" to the time of the illegal importation in which Theobald had a discussion about the witness buying marihuana from Theobald. This evidence was offered to show motive that Theobald had reason to import a substantial quantity of marihuana because he was engaged in the sale of marihuana.

The prior act in the instant case should also be admissible for the exact same reason as the act in Theobald. Here the time was not "very close", but it was only two months before, and from the fact that the defendant delivered the 18 kilos in Los Angeles, it is an easy inference that he also was involved in the sale of marihuana and therefore had a motive to smuggle it across the border. Even without the sale aspect the prior act certainly shows transportation of marihuana which is one of the charges.

In addition to the reasons already stated the prior act could also show a motive for having another drive his vehicle across the border since the appellant had just been arrested two months before.

The prior act also shows the appellant's knowledge of

what marihuana is and the illegal nature of marihuana.

Certainly the prior similar act is "prejudicial" in the sense that it was probative of knowledge and; therefore quilt. However, it was not prejudicial in the sense that appellant's conviction was somehow secured in violation of some real or imagined constitutional right. On balance, the probative value of such a prior similar act far outweighs any prejudice.

United States v. Anthony, supra; United States v. Theobald, supra.

See also Craft v. United States, 403 F.2d 360 (9th Cir. 1968), which was a prosecution for aiding and abetting the illegal importation of marihuana in which this court upheld the admissibility of prior acts involving a sale of benzedrine tablets to show intent to defraud and the prior use of marihuana to show that appellant might smuggle marihuana for his own use.

C. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR WHEN ON VOIR DIRE IT ASKED ANY JURY MEMBER TO EXCUSE THEMSELVES IF THEY HAD A BIAS AGAINST MEXICAN PEOPLE OR IF THEY USED MARIHUANA.

The following verbatim record from pages 14, 15, and 16, of the Record of Trial is the trial court's statement to the jury on this issue:

"This particular defendant, as you can tell from his name and from the fact that these proceedings are being interpreted to him, is of Mexican extraction. I'm not so naive to believe that there are not some people who are prejudiced to people of Mexican extraction; and, quite frankly, we don't want you to serve on the jury if you

have those feelings. Now, it's a little difficult for a person to stand up and say, "I'm prejudiced." However, it's your sworn obligation to remove yourself from this jury if you harbor any such feeling. I'm telling you right now that if you have prejudices or bias against people of Mexican extraction that would keep you from being objective as a juror, you cannot sit on this case. You will have to sit on some other case. That's one problem.

The other problem is that some of you may be a user of marihuana. I can't ask you that question, because you have a Fifth Amendment right to deny it. But if you use marihuana, even a little, I don't want you on this jury, because it just wouldn't be fair to have a person that is influenced that way in breaking the law, which it is, to sit in judgment upon a person as to whether or not he has broken the law in bringing in the very substance he is using.

So I am going to allow anybody to excuse themselves from this jury at this time if they fall in either one of those

categories, either they have a bias against Mexican people or they have tampered with this drug. In either case, under your sworn obligation, it is now, in good conscience, your responsibility to stand up and leave, and I won't ask you any questions at all. So if you fall in either of those categories, please leave at this time.

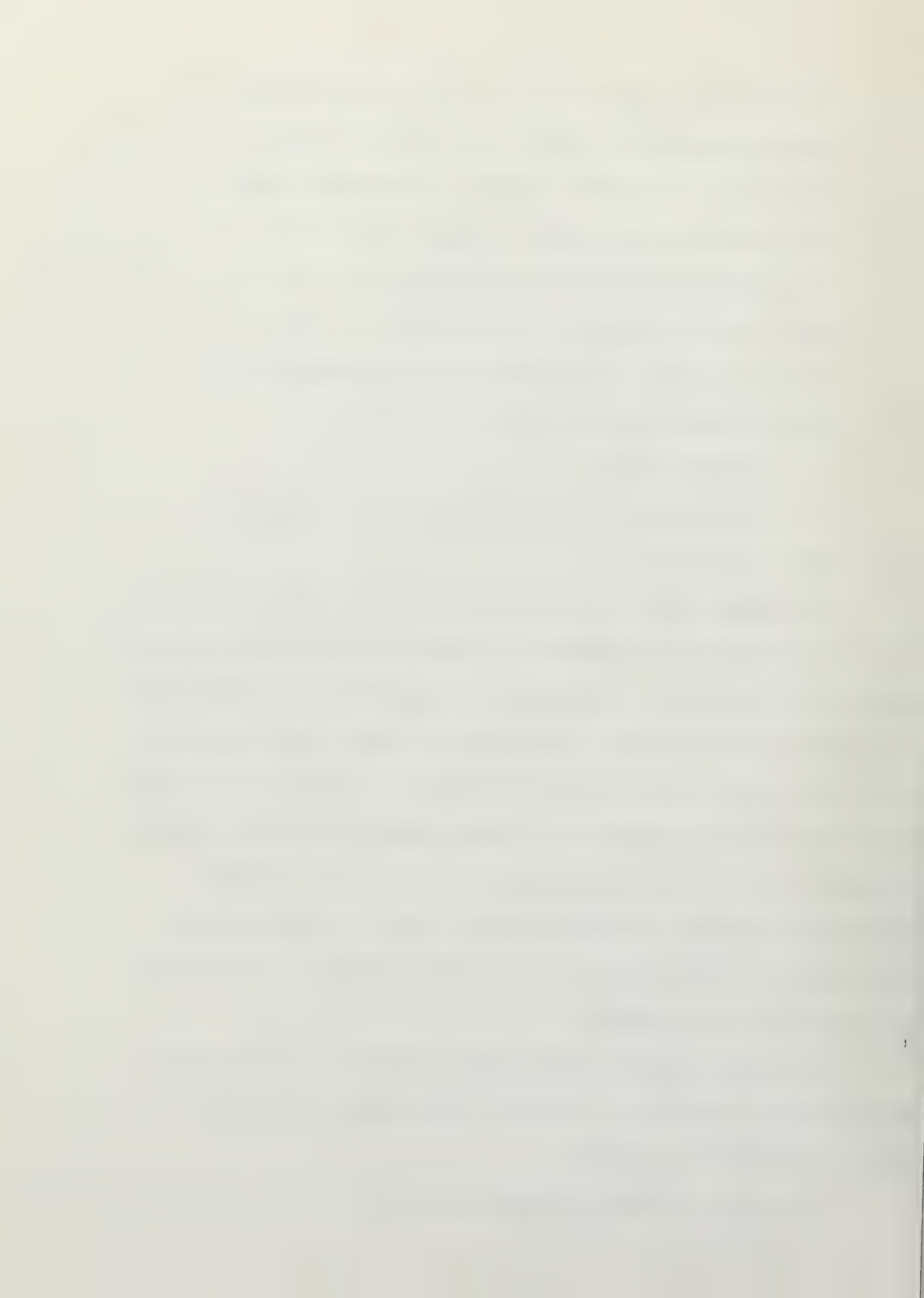
Anyone else?

All right. Draw another name to replace Mr. Dawson."

Appellant made no objection to the courts excusing this one witness who answered affirmatively to the court's question. Therefore, as stated in appellant's brief, the standard is plain error. Counsel for appellant states at page 18 of his brief that one reason he did not object was his reluctance to argue the matter before the jury panel. Counsel was fully aware as shown by the many side-bar conferences in the record of trial that he could have registered any objection out of the presence of the jury by approaching the bench.

The government submits that not only is this not plain error, but that it is not any error at all and is in fact a desirable practice.

In Beck v. United States, 298 F.2d 622, 629 (9th Cir. 1962),



cert. denied, 370 U.S. 919, which was a case involving pretrial publicity this court stated that the findings of the trial court upon that issue (the force of a prospective juror's opinion) ought not to be set aside by a reviewing court unless the error is manifest.

In Parker v. United States, 407 F.2d 540 (9th Cir. 1969), the trial court rather peremptorily dismissed a juror during voir dire when it developed in a counterfeiting case that her husband was employed by a Federal Reserve Bank. There was a light objection by Parker's counsel. The court stated at page 542:

"This was done not according to any scheme or plan, but obviously out of the court's consideration for the defendant. The defendant is entitled to a good jury, but can't expiate his crime by making a big issue of one juror who was excused and we think, quite rightly."

In the instant case, only one juror was excused and there was no objection so there was no chance for the court to inquire further into the specific prejudices that juror possessed. This manner of asking the question allows the juror to excuse himself without publicly admitting that he uses marihuana or is prejudiced against Mexican people. Both of these are more than sufficient reason to excuse a juror, and without this type of question it is highly probable that

neither one would come to light. Use of marihuana is a crime and no one is going to admit it from the jury box.

It is possible that a person could use marihuana and still be an impartial juror, but this is something which could not be explored without making the juror admit he uses marihuana.

It is also possible that a person could be prejudiced against Mexican people and still not be challenged by a Mexican defendant. But, without this dual question it is highly unlikely that anyone would admit their prejudice.

In United States v. Puff, 211 F.2d 171, 184, 185 (2d Cir. 1954), cert. denied, 347 U.S. 963, rehearing denied, 347 U.S. 1022, the Second Circuit stated:

"It will be noted that all the cases above cited stem from the fundamental theory that the American jury should be composed of impartial jurors. As a result, a party is entitled to an array of impartial jurors to which he may direct his peremptory challenges. To this a party is entitled as of right. But granted this, a party is entitled to no more. Having no legal right to a jury which includes those who because of scruple or bias he thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause,

are excused by the judge."

If the purpose of voir dire is to obtain an impartial jury, then it is submitted that the question by the trial court in the instant case was reasonable and was certainly inclined to produce a more impartial jury.

There is also no indication that the jury selected was not completely fair and impartial.

IV


CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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1972

No. 71-2615

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LEWISTON ORCHARDS IRRIGATION DISTRICT,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

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**REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

In its opening brief, the Board stated, in contrasting this case with the Supreme Court's decision in *N.L.R.B. v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), that, unlike *Hawkins* "there appears to be no ouster provision under Idaho Law applicable to the District's directors." (Bd. Br. p. 14). Contesting that assertion in its answering brief (Dist. Br. pp. 5-6), the District cited two provisions of the

Idaho Code, Title 19, Chapter 41, Sec. 4101, and Title 6, Chapter 6, Sec. 602 which, the District contends, “in effect, provide for ouster of irrigation district directors, . . .” (Dist. Br. p. 5). As we show below, however, the statutory provisions cited by the District do not provide ground for denying enforcement of the Board’s order.

In the first place, having failed to bring these two sections of the Idaho Code to the attention of the Board, either in the representation proceeding or the unfair labor practice proceeding, the District is precluded from asserting this point before the Court. For Section 10(e) of the Act, provides, in pertinent part, that “no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” See *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *N.L.R.B. v. District 50, United Mine Workers*, 355 U.S. 453, 463-464 (1958); *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *Marshall Field v. N.L.R.B.*, 318 U.S. 253, 256 (1943). Moreover, while the issue of the Board’s statutory jurisdiction may be raised at any time, the “facts upon which the Board determines it has jurisdiction may be challenged only upon timely exception, in the absence of which the Board’s findings are not open to attack in the proceeding for enforcement.” *N.L.R.B. v. Peyton Fritton Stores, Inc.*, 336 F.2d 769, 770 (C.A. 10, 1964). It follows that the additional facts proffered by the District cannot now be raised for the first time as a defense to the Board’s order. *N.L.R.B. v. Pappas & Co.*, 203 F.2d 569, 571 (C.A. 9, 1953); *N.L.R.B. v. Townsend*, 185 F.2d 378, 380-381 (C.A. 9, 1950), cert. denied, 341 U.S. 909; *N.L.R.B. v. Ferraro’s Bakery*, 353 F.2d 366, 369 (C.A. 6, 1965). In any event, as we now show, the cited statutes do not militate against the issuance of an enforcement decree.

Title 19, ch. 41, Sec. 4101 of the Idaho Code provides the following:

19-4101. Presentation of accusation. — An accusation in writing against any district, county, precinct, or municipal officer for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.

Although on its face the use of the word “district” might be read to include such special districts as irrigation districts, the Idaho Courts have applied this section to but one “district,” a school district, *Corker v. Cowen*, 30 Idaho 213, 164 Pac. 85, 86 (1917), an entity which the Idaho Supreme Court has characterized as “an agency of the state, created by law solely for the operation of a school system for the public benefit.” *Common School Dist. No. 61 in Twin Falls County v. Twin Falls Bank & Trust Co.*, 4 P.2d 342, 343 (1931). Moreover, other applications of Idaho law relating to removal of civil officers have been limited to entities with obvious and unquestionable “agency-of-the-state” status. *Jacobson v. McMillan*, 64 Idaho 351; 132 P.2d 773, 776 (1943) (Sheriff); *Corker v. Pence*, 12 Idaho 152, 85 Pac. 388 (1906) (County Commissioner); *McRoberts v. Hoar*, 28 Idaho 163, 152 Pac. 1946 (1915) (County Treasurer); *Collman v. Wana-maker*, 27 Idaho 342, 149 Pac. 292 (1915) (Member of Board of Village Trustees); *Robinson v. Huffaker*, 23 Idaho 173, 129 Pac. 334 (1912) (County Commissioner); *Ponting v. Isaman*, 7 Idaho 283, 62 Pac. 680 (1900) (County Commissioners). In view of these cases and the Idaho Supreme Court’s continued recognition of districts such as Lewiston Orchards as essentially private ventures (see Bd. Br. p. 11), we submit it is doubtful that Section 4101 would be held to apply to irrigation districts.

By contrast, in *First Suburban Water Utility District v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948, 952 (1941), where the Tennessee ouster law was held applicable to officers of an irrigation district, and on which decision the Supreme Court relied in *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, *supra* at 607, the Tennessee Court expressly held that utility districts in Tennessee, because of state legislative characterization, were “arms of government” (146 S.W.2d at 950). The meaning of *McCanless* is clearly that the Tennessee ouster law will be applied only to officials serving in agencies which the legislature intended to be state agencies. See also *State ex rel. Harris v. Buck*, 138 Tenn. 112, 196 S.W. 142, 143-144 (1917).

Thus, in view of sharply differing legislation and court decisions relating to such special purpose districts in Tennessee and Idaho, we submit that it is fair to conclude that the Idaho Supreme Court would not find Section 4101 applicable to irrigation district officials. Certainly, the District has failed to show in any way that Section 4101 is applicable here.

Nor is the District’s cause furthered by Title 6, Sec. 6-602 which states in pertinent part:

6-602. Actions for usurpation of office. — An action may be brought in the name of the people of the state against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority of law. Such action shall be brought by the prosecuting attorney of the proper county when the office or franchise relates to a county, precinct or city, and when such office or franchise relates to the state, by the attorney general;

* * * * *

Any person rightfully entitled to an office or franchise may bring an action in his own name against the person

who has usurped, intruded into, or who holds or exercises the same.

Contrary to the District's argument, (Dist. Br. 5-6), application of this provision to irrigation districts by the Idaho Supreme Court in *Tiegs v. Patterson*, 318 P.2d 588 (1957), does not afford support for the contention that the District is a political subdivision of the State. By its plain meaning, Section 6-602 insures¹ that one who assumes office after an election held under Idaho State election laws is entitled to do so. As we have shown, the Idaho Irrigation District law requires that elections of irrigation district officials follow state election laws (see Bd. Br. P.4, n. 4). The application of Section 6-602 to irrigation districts protects the State's interest in seeing that persons elected as directors under color of its election laws are not deprived of their office. Section 6-602 adds nothing to whatever weight is to be given to the fact that irrigation district elections are held in accordance with state laws, and clearly has nothing to do with State control over the actions of the directors, who are selected only by the landowners of the District. Further, Section 6-602 does not relate to state regulation but is limited to usurpation of office and is thus substantially different from the general ouster law relied on by the Supreme Court in *Natural Gas*, which had reference to acts done by the district directors while in office. Finally, in *Tiegs v. Patterson* the Idaho Supreme Court left undisturbed its earlier determination that the very district under consideration in *Tiegs* was "organized . . .

¹ Section 6-602, as the Idaho Supreme Court states in *Tiegs*, applies to any office including appointive office (at 318 P. 2d 591). However, in *Tiegs* Sec. 6-602 was specifically applied to an irrigation district official who allegedly received fewer votes in an irrigation district election than the plaintiff.

to conduct a business for the private benefit of the owners of land within its limits." *City of Nampa v. Nampa Meridian Irr. Dist.*, 19 Idaho 779, 115 P. 979, 982 (1911). See also *Nampa & Meridian Irr. Dist. v. Briggs*, 27 Idaho 84, 147 P. 75 (1915).

CONCLUSION

For the reasons set out above, and in our opening brief, we respectfully submit that the Board's order should be enforced in full.

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May 1972.

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Respondent.

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

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The Board's Finding that Respondent is an employer within the meaning of Section 2(2) of the National Labor Relations Act is legal error.

The legal touchstone for resolution of the single issue in this case is the decision of the U.S. Supreme Court in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600. The Board's brief correctly notes that the term "political subdivision" is not defined in the Act and that the Supreme Court in Natural Gas found that the legislative history did not disclose that Congress explicitly considered its meaning. It is also true that the Court in Natural Gas noted that the Board has the authority and duty of determining in the first instance what a "political subdivision" within the meaning of the Act is and that its interpretation is entitled to weight. However, in Natural Gas the Supreme Court explicitly refused to decide that the Board's two alternative criteria, i.e., (1) direct creation by the State so as to constitute a department or administrative arm of government or (2) administration by individuals who are responsible to public officials or to the general public, must be met. The Supreme Court eschewed adoption of the Board's alternative criteria and instead explicated the correct rule of law for defining "political subdivision" as that set forth by the Court of Appeals for the Fourth Circuit saying at 402 U.S. 603:

The Court of Appeals for the Fourth Circuit dealt with this question in NLRB v. Randolph Electric Membership Corporation, 343 F.2d 60, 58 LRRM 2704 (1965), where the Board had determined that Randolph Electric was not a "political subdivision" within §2(2). We adopt as correct law what was said at pages 62-63 of the opinion in that case:

"There are, of course, instances in which the application of certain federal statutes may depend on state law. . . .

"But this is controlled by the will of Congress. In the absence of a plain indication to the contrary, however, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law. *Jerome v. United States*, 318 U.S. 101, 104, 63 S.Ct. 483, 87 L.Ed. 640 (1943).

"The argument of the electric corporation fails to persuade us that Congress intended the result for which they contend. Furthermore, it ignores the teachings of the Supreme Court as to the congressional purpose in enacting the national labor laws. In *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 123, 14 LRRM 614 (1944), the Court dealt with the meaning of the term "employee" as used in the Wagner Act, saying:

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization, and of collective bargaining. The Wagner Act is federal legislation, administered by a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt, for the disposition of unrelated local problems."

"Thus, it is clear that state law is not controlling and that it is to the actual operations and characteristics of [respondents] that we must look in deciding whether there is sufficient support for the Board's conclusion that they are not 'political subdivisions' within the meaning of the National Labor Relations Act."

Then the Court went on to note at 402 U.S. 605:

"This case does not, however, require that we decide whether 'the actual operations and characteristics' of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for the exemption [from the definition of employer contained in the Act]. . . .

The substance of the governing federal law set forth in

Natural Gas is that it is the actual operations and characteristics

of the entity concerned which controls the conclusion whether it is a political subdivision within the meaning of the Act. In Natural Gas the Court considered many factors making up the actual operations of the entity there concerned and many of the characteristics. The comparisons set forth below compel the conclusion that Respondent, based on its actual operations and characteristics is a political subdivision under the law of Natural Gas.

Respondent was organized under Title 43 of the Idaho Code. As the Supreme Court noted in Natural Gas with respect to Tennessee residents, Idaho residents, may under Title 43 create or utilize irrigation districts ". . .to provide a wide range of public services" 402 U.S. 605. In common with the Natural Gas Utility District of the State of Tennessee an Idaho irrigation district is empowered to provide water, garbage disposal service, parks and recreation facilities; Respondent provides all. In addition, Respondent could construct and operate electric power plants. 43-313,314.^{1/} Idaho citizens wishing to form an irrigation district petition the Board of County Commissioners of the County, 43-102, whereas in Tennessee the petition goes to a County Court. The Idaho County Commissioners then hold a hearing, 43-106, as does the County Court in Tennessee. Finding the application in proper order, and upon approval of the Idaho State Department of Reclamation, 43-107, the County Commissioners put the matter of formation of a district up for vote among voters in the proposed

^{1/} References to Sections of the Idaho Code are made __-__, showing Title and Section, respectively.

district, 43-110. Voters in irrigation district elections, whether for formation or other purposes, must possess all the qualifications required of an elector under the general laws of the State of Idaho, own land within the district and be a resident of the county in which the district or portion thereof is located, 43-111. The elections must be conducted as nearly practicable in accordance with general laws of the state, 43-112.

As with the utility district in Natural Gas, Respondent is operated on a nonprofit basis and after creation has perpetual existence subject only to provisions for dissolution as set forth in Chapter 13 of Title 43. It is interesting to note that in connection with dissolution or modification of an irrigation district the Idaho Courts are called upon to review and confirm petitions for modification or dissolution with or without election, 43-1306--1333. As conceded in the Board's brief Respondent's property is exempt from state taxation under state law, Board's brief, page 4.

As in Natural Gas, Respondent's records are public records and must be opened to inspection by any voter eligible to vote on irrigation matters, 43-303, and more significantly must be opened to inspection by the County Commissioners or their designee, 43-325. This is a clear indication that the legislature of the State of Idaho intended that irrigation districts be administered by district directors who are responsible to public officials, i.e., county commissioners. Contrary to the Board's assertion in its brief, one of its own alternative criteria, administration by individuals

responsible to public officials is met in the instant case.

As in Natural Gas, Respondent is required to publish in a newspaper of general circulation a statement of financial condition in a form prescribed by the Bureau of Public Accounts of the State of Idaho and shall file a certified copy of such statement with the State Department of Reclamation, 43-324. This is another explicit instance of the state legislature's intent that irrigation district directors be responsible to public officials and to the general electorate.

In Natural Gas (402 U.S. at 607), the Supreme Court noted that the utility district commissioners are subject to Tennessee's general ouster law regarding misfeasance or non-feasance. In its brief the Board states that there appears to be no ouster provision under Idaho law applicable to the district's directors. The Board is in error. Under Idaho law there are two provisions which, in effect, provide for ouster of irrigation district directors, albeit not on precisely the same grounds as the Tennessee law provides. The first, is set forth in Title 19 of the Idaho Code, Chapter 41, entitled Removal of Civil Officers. Section 4101 reads:

PRESENTATION OF ACCUSATION. An accusation in writing against any district, county, precinct, or municipal officer, for willful or corrupt misconduct in office, may be presented by the Grand Jury of the County for or in which the officer accused is elected or appointed. (underlines added)

The second provision is set forth in Title 6 of the Idaho Code, Chapter 6, entitled Usurpation of Office or Franchise. 6-602 provides for an action to be brought for the usurpation of

office and was found specifically applicable to the position of irrigation district director by the Supreme Court of Idaho in its decision of Tiegs v. Patterson, 79 Idaho 365, 318 P.2d 588 (1957).

While the district's directors do not have the power to subpoena witnesses they do have the statutory authority to administer oaths in connection with required hearings, 43-1103.

As with the utility district in Natural Gas, Respondent has the power of eminent domain, 43-304, 43-908. Respondent does not have general taxing power. However, neither does the utility district in Natural Gas, 402 U.S. 606. While lacking the power of general taxation Respondent does have authority to levy and collect assessments for the purpose of raising revenue needed for the provision of any of its purposes, 43-321.

In addition to providing water, Respondent has authority to provide parks and recreation facilities, 43-326, construction and operation of electric power plants, 43-313, rodent extermination programs, 43-315, perform the functions of drainage district, 43-307, 308. In connection with the power to maintain parks it is interesting to note that the legislature has provided that the Respondent shall have the power ". . .to maintain public parks and recreation grounds for the benefit of the people^{1a/} of the District", 43-326. Respondent's authority, since 1953, to make provisions for the operation and maintenance of garbage disposal programs is stated to be for the benefit of "residents"^{1b/} of the District, 43-1901, not merely for landowners of the District. The Board's effort to equate Respondent with state chartered private enterprises

or publically regulated but privately owned utilities is clearly at odds with the legislature's intent.

As with other municipalities in the State of Idaho, Respondent may issue warrants, 43-322, and the legislature has provided that the warrants ". . .shall be in form and substance the same as county warrants or as near as the same may be practicable...."

As in Natural Gas, Respondent is regarded as a "political subdivision" under federal law other than the National Labor Relations Act. Thus the Board concedes that income from its bonds is exempt from federal income taxation, as was the case in Natural Gas. Also, as conceded by the Board, under the federal social security law Respondent is considered to be a "political subdivision" whose employees participate in social security coverage through voluntary rather than mandatory coverage.

Title 57 of the Idaho Code deals with public funds in general. Chapter 3 of Title 57 relates to filing requirements for state instrumentalities issuing bonds. In particular, Section 307 of Title 57 provides:

57-301. TREASURER TO FILE LISTS IN RECORDER'S OFFICE--CONTENTS--STATEMENT UPON REDEMPTION OR PAYMENT OF BOND. The treasurer of every county, good road district, highway district, city, village, including all special improvement district bonds of cities and villages, school district, drainage district and irrigation district, shall file a list of all bonds of every kind which have heretofore been issued and are now outstanding as obligations of such political subdivision, and those which may hereafter be issued by any such political subdivision, in the office of the county recorder of the county in which such bonds have been or are issued. The treasurer of such

political subdivision shall within sixty days after the taking effect of this chapter, file list of all such bonds in the office of the county recorder with the information as herein specified concerning such bonds; within thirty days after the sale or delivery of any bonds issued by any such political subdivision herein enumerated after the taking effect of this chapter, the treasurer of such political subdivision shall file in the office of the county recorder a list of such bonds with the information as herein provided.

The lists of bonds herein required to be filed shall contain the following information: (a) the amount of the bond issued; (b) the purpose of the bond issue; (c) the dates of issuance; (d) rate of interest; (e) length of time such bonds are to exist; (f) the serial numbers of the bonds; (g) a statement of the amount of bonded indebtedness outstanding.

When any bonds are redeemed or paid in any such political subdivision, the treasurer of such subdivision shall within thirty days after the payment of redemption of such bonds, file in the office of the county recorder a statement showing the following facts: (a) the amount of bonds paid or redeemed; (b) designate what bonds were so paid or redeemed. [1921, ch. 171, §1, P. 366; am. 1925, ch. 132, §1, p. 188; I.C.A., §55-301.]

(underlines added)

Thus, the legislature of the State of Idaho has specifically referred to irrigation districts as "political subdivisions".

In its decision on the representation petition, 186 NLRB No. 121, (R-12)^{2/} (the Board states) the Idaho Courts have stressed that the landowners are considered members of such a corporation, control its affairs, and alone are benefited by its operations, and that such irrigation districts operate in a proprietary rather than a public capacity. Two of the cases which the Board cite in support of this assertion were decided in 1911, a third in 1915. The fourth case, Tingwall v. Kinghill Irrigation District, was decided as late as 1955

^{2/} Respondent adopts the abbreviation code of the Board set forth in footnote 1 of its brief.

but the issue there, collateral attack of a judgment, is not particularly helpful to the issue in the case at bar.

Unmentioned by the Board are portions of two Idaho court decisions which indicate that the state courts have also found a definite and clear public character to irrigation districts. First, in Pioneer Irrigation District v. Walker, 20 Idaho 605, 119 Pac. 304 (1911), where the court dealt with the issue as to the constitutionality of a legislative act setting forth the qualifications for voters in an irrigation district. The requirements were found to be in conflict with the state constitution, and the court there held:

[1] The first and most important question in this case is, Do the sections of the Constitution above quoted apply to elections held in irrigation districts created under the laws of this state? The Constitution of this state was adopted by the people of the entire state and was for the government of the people of the state, and the provisions therein found are intended to apply to the entire state, unless otherwise provided, and to every legal subdivision thereof, whether created by the Constitution or the Legislature. The provisions of the Constitution with reference to the qualifications of voters were intended to apply not only to state elections, but to elections held by the legal subdivisions of the state.

[2] There is no separate or distinct qualification provided by the Constitution for voters at elections held in counties, cities, villages or other municipalities. To all such elections sections 1 and 2 of article 6 apply.

In the case of Hertle v. Ball, 9 Idaho, 193, 72 Pac. 953, this court held that irrigation districts were public corporations, and that the general election laws of the state providing for contesting elections applied to contests of elections for directors held in an irrigation district.

(underlines added)

The other case is Indian Cove Irrigation District v. Prideaux, 25 Idaho 112, 136 Pac. 618 (1913) where the court had before it an issue with respect to the legality of including certain lands in irrigation district over the objection of a landowner. The court held:

* * *

[5] It is settled law that irrigation districts are public corporations although not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray the expense of constructing and operating irrigation systems and the conduct of the business of the district. Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 Sup. Ct. 56, 41 L.Ed. 369; Pioneer Irr. Dist. v. Walker, 20 Idaho, 605, 119 Pac. 304; In re Bonds of Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106.

One of the essential attributes of a public corporation, as distinguished from a private corporation, is that membership in the former is involuntary and based upon some geographical or similar classification, while membership in the latter is based on consent. Morawitz on Priv. Corp. (2d Ed.) §3; Thompson on Corp. §21.

As illustrating the fundamental basis of the law of irrigation districts, the Supreme Court of the United States in Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 Sup. Ct. 56, 41 L.Ed. 369, said: "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such cases the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

It is clear that irrigation districts as public corporations are not based upon consent of all the members and may include lands without the consent of the owner entryman.

* * *

The Board implies, as admittedly do some of the Idaho Court decisions, that upon dissolution surplus assets of an irrigation district would be distributed to members. It is not at all clear that upon dissolution the properties of an irrigation district would be distributed to the landowners in the district. Nothing is provided in Idaho law to determine the respective shares. Despite the gratuitous comments of the Idaho Supreme Court, dissolution of an irrigation district must be according to Chapter 13 of Title 43 of the Idaho Code. Nowhere in Chapter 13 is it indicated that any surplus property of the district, upon dissolution, will become the property of the landowners in the district. While there has been no court decision interpreting the question of where surplus property would go, in view of the fact that the property has been tax exempt, that the districts have authority to designate properties to be held for parks and recreation for the benefit of all the people of the district, not limited to landowners, that garbage disposal facilities shall be maintained and operated for the benefit of residents, not limited to landowners, it is likely that surplus properties would be considered by the courts to be public property and would escheat to the State of Idaho upon dissolution.

As in Natural Gas, compensation for Respondent's directors is nominal. 43-319.

The Board places unwarranted emphasis and attempts to prove too much upon the use by the Idaho Courts of the word "proprietary" in connection with irrigation districts. Admittedly,

Respondent owns its water distribution facilities, its park lands, its swimming pool, its garbage disposal facilities, in a "proprietary" way. So do counties, cities, villages, or other undisputed political subdivisions of the State of Idaho (or any state) which provides such facilities. In this sense, the word "proprietary" simply does not distinguish itself from the concept of "public" as the Board implies.

The principal failure of the Board's reasoning is its failure to take cognizance of the fact that Respondent's operations, while perhaps limited from general public control by voter qualification, is not otherwise analogous to privately owned and controlled utilities which are created and regulated by states. Respondent does not operate for a profit. Shareholders in the private utility are not the same as the landowners in the district. It is purely voluntary for a person to become a shareholder in a public utility; as has been shown landowners can be included in an irrigation district over their strenuous objection. Finally, while Respondent was perhaps initially formed (the enabling legislation 43-111 was passed in 1903) for the exclusive benefit of landowners within the district, its purposes, powers, and responsibilities have been radically altered. The power to maintain parks and recreation grounds was added in 1935 (43-326) and the power to make provisions for the operation and maintenance of garbage disposal programs was added as late as 1946. It is unfair and inaccurate to characterize anything but the furnishing of water as secondary or ancillary functions.

Under the actual operations and characteristic test, Respondent is now a political subdivision. Except for roads and police, Respondent is doing and is authorized to do, a great many, if not all, of the things which a city, town or village normally does for its residents, i.e., water systems, parks and recreation, garbage facilities, a contribution towards fire protection by installing and maintaining hydrant systems.

On the other hand, Respondent has very little likeness to the private utility corporation which was the type involved in Randolph Electric Membership, supra. Thus in Randolph only electric power was provided, only to persons who voluntarily became members, and operational control resided only in those individuals or landowners who voluntarily sought to have electric power service afforded them.

CONCLUSION

The actual operations and characteristics of Respondent " . . . betoken a state, rather than a private instrumentality." Natural Gas, 402 U.S. 608. The Board's petition for enforcement must be denied.

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April 24, 1972

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LEWISTON ORCHARDS IRRIGATION DISTRICT,
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

FILED

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BRIEF AND SUPPLEMENTAL APPENDIX FOR
THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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Alabama Power Co. v. Cullman County Membership Corp., 234 Ala. 396, 174 So. 866 (1937)	12
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Berry v. Southern Pine Elec. Power Corp., 222 Miss. 260, 76 So.2d 212 (1954)	12
Booth v. Clark, 42 Idaho 284, 244 P. 1099 (1926)	13
Bush v. Aiken Elec. Coop., Inc., 226 S.C. 442, 85 S.E. 2d 716 (1955)	13
Byrd v. Blue Ridge Elec. Coop., Inc., 215 F.2d 542 (C.A. 4, 1954, cert. denied, 348 U.S. 915 (1955))	13
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City of Paris, Kentucky v. Federal Power Commission, 399 F.2d 983 (C.A.D.C., 1968)	13

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Fayetteville-Lincoln County Elec. System, 183 NLRB No. 19, 74 LRRM 1278 (1970)	8
Indian Cove Irrigation District v. Prideaux, 25 Idaho 112, 136 P. 618 (1913)	13
IBEW, 87 NLRB 99 (1949)	9
Jensen v. Boise-Kuna Irrigation Dist., 75 Idaho 133, 269 P. 2d 755 (1954)	11
Lewiston Orchards Irrigation Dist. v. Gilmore, 53 Idaho 377, 23 P.2d 720 (1933)	5
Mobile SS Ass'n., 8 NLRB 1297 (1938)	8
Nampa & Meridian Irr. Dist. v. Briggs, 27 Idaho 84, 147 P. 75 (1915)	5
Natchez Trace Elec. Power Ass'n, 193 NLRB No. 144, 78 LRRM 1433 (1971)	8
N.L.R.B. v. Natural Gas Utility Dist. of Hawkins County, 402 U.S. 600 (1971)	8, 11, 14
N.L.R.B. v. Randolph Elec. Membership Corp., 343 F.2d 60 (C.A. 4, 1965)	8, 13
New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority, 127 NLRB 1322 (1960)	9
New Jersey Turnpike Authority, 33 LRRM 1528 (1954)	9
North Carolina Pub. Serv. Co. v. Southern Power Co., 282 Fed. 837 (C.A. 4, 1922), writ of certiorari dismissed, 263 U.S. 508 (1924)	12
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Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644, 647 (C.A. 5, 1950), cert. denied, 349 U.S. 829	12
Tingwall v. King Hill Irr. Dist., 66 Idaho 76, 155 P. 2d 605 (1945).	5
Truckee-Carson Irrigation Dist., 164 NLRB 1176 (1967).	8
Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N.C. 52, 175 S.E. 698 (1934)	12

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 71-2615

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LEWISTON ORCHARDS IRRIGATION DISTRICT,
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF AND SUPPLEMENTAL APPENDIX FOR
THE NATIONAL LABOR RELATIONS BOARD

ISSUE PRESENTED

Whether the Board properly concluded that Lewiston Orchards Irrigation District is an "employer" within the meaning of Section 2(2) of the Act.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order (R. 32-42),¹ issued against Lewiston Orchards Irrigation District (hereafter the "District") on April 23, 1971, and reported at 190 NLRB No. 10. The Board's Decision and Direction of Election in the underlying representation proceeding (R. 8-16), which forms part of the record in this case, is reported at 186 NLRB No. 121. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Nez Perce County, Idaho, where the District supplies water, park and recreation facilities, fire protection service and performs other similar services.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the District violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union² certified as the representative of its employees in an appropriate unit.³ The Board rejected the District's contention that it was not covered by the Act because it was exempt

¹ "R." references are to the bound volume of original papers and "Tr." references are to the transcript of testimony before the hearing officer in Board Case No. 19-RC-5387. "GCX" and "RX" refer respectively to the exhibits of the General Counsel and Respondent. "Code" references are to sections of the Idaho Code, reprinted as a supplemental appendix ("S.A.") at the end of this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² Teamsters Union Local No. 551, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Independent.

³ "All employees employed by the Employer, excluding all seasonal swimming pool employees, office clerical employees, professional employees, guards and supervisors as defined in the Act." (R. 14-15).

as a political subdivision of the State of Idaho (R. 13-14). The facts underlying the Board's conclusions are undisputed and may be summarized as follows:

A. The District's business and operations

The District, organized pursuant to Title 43 of the Idaho Code, as amended, has as its principal purpose the supplying of water to residents or landowners within its boundaries. The District covers an area of approximately 3,600 acres and serves a population of between 13,000 and 15,000 (R. 9; Tr. 9, 28). Although one-fourth of the land area is farmland, less than 95 percent of the water stored or delivered is used for agricultural purposes (R. 9; Tr. 8). The District supplies domestic water, which is chlorinated and treated through a filter plant, to homes, and irrigation water which is supplied to farms directly from its reservoir (R. 9; Tr. 9-10). In 1969, domestic use of water was 777 acre feet and irrigation consumed over 5,000 acre feet (R. 9; Tr. 36). When surplus water is available, persons outside the District's boundaries receive water under surplus water contracts (R. 10; Tr. 14-15).

In addition, the District provides irrigation water to the hydrant system which is operated by an independent instrumentality of the State; the District also installs and maintains the hydrant system. (R. 10; Tr. 22). Another secondary operation of the District is the providing of recreational facilities to residents and landowners within the District. It owns and operates a swimming pool and a ten-acre public park with lighted baseball fields, playground equipment, and picnic facilities (R. 10; Tr. 16-19). The District also provides picnicking, camping, and boating facilities at its reservoirs (R. 10; Tr. 18-19). Finally, the District leases certain land for use as a land fill garbage dump for residents (R. 10; Tr. 19). The District makes user charges for its secondary services (R. 10; Tr. 20, 31).

Under Title 43 of the Idaho Code, fifty landowners, or a majority of the landowners in a proposed irrigation district, may petition the appropriate board of county supervisors for the establishment of an irrigation district (R. 10; Code 43-101-105, S.A. 1-4). Such a petition to create the instant District was presented to the Board of County Commissioners of Nez Perce County, where the District is located (R. 10; Tr. 54, Code 43-105, S.A. 4). After examination and approval of the proposed district by the Idaho Department of Reclamation a hearing was held as provided by statute (R. 10; Tr. 54, Code 43-106-108, S.A. 4-6). Thereafter, by direction of the Board of Commissioners, the eligible landowners of the District elected a Board of Directors (R. 10; Tr. 54, Code 43-109-111, S.A. 6-8).⁴ Under the Code, vacancies in the Board of Directors are to be filled by appointment by the remaining members of the Board (R. 11; Code 43-209, S.A. 9). The Code provides that the District may be dissolved or modified (R. 11; Code 43-1301, 1309, S.A. 22) at any time. Currently, and for over twenty years, Idaho has not assessed the District's property, which is exempt from State taxation under State law (R. 11; RX 17, S.A. 29-31). The District's financial records have been audited by an independent accounting firm and since 1969, State law has required the District to prepare and file an annual financial report with the State Auditor, although the District has not done so (R. 11; Tr. 54, RX 17, Code 67-1019, S.A. 31-32). The District is operated by a manager, Donald Reeder, who is responsible solely to the Board of Directors, and the District's daily operations are free from any direct supervision or control by the State (R. 11; Tr. 8-9). The District hires its own employees and sets the terms and conditions of their employment. It also has the

⁴ Under the Code, eligible voters were limited to landowners within the proposed District who possessed all the qualifications of the electors under the general laws of the State of Idaho, and the election was to be conducted as nearly as practicable in accordance with the general laws of the State (Code 43-111, 112, S.A. 7-8).

usual powers of a private corporation. Thus, it may sue and be sued, incur obligations, issue bonds (see *supra*) purchase, sell and encumber its property, and enter into contracts in the exercise of the powers granted to it. (Code 43-304, 43-316, 317, S.A. 9-12).

The District has the power of eminent domain and authority to levy and collect assessments to raise money for its established purposes (R. 11; Code 43-908, 43-321, S.A. 12-14, 21). It may issue bonds and sell them in the municipal bond market (R. 11; 43-401, S.A. 15-17). Surplus bonds are deposited under the State Public Depository Law or invested in bonds specified in the State Code (R. 11, 43-1057, S.A. 23-24).

The Idaho Supreme Court has repeatedly held that the District is similar to a "public corporation" having only such incidental municipal powers as are necessary to its internal management and proper conduct of its business. The State's Supreme Court also noted that the District's primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of landowners within the district, its property being held in trust for them in a proprietary capacity.⁵ Other decisions of the State Supreme Court have similarly characterized an irrigation district as a "public quasi corporation" or "mutual co-operative corporation," organized to conduct a business for the private benefit of the owners of the land within its jurisdiction. Thus, the State decisions have stressed that the landowners are considered the members of such a corporation, control its affairs, and alone are benefitted by its operations; and further,

⁵ *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720, 722 (1933), *City of Nampa v. Nampa-Meridian Irr. Dist.*, 19 Idaho 779, 115 P. 979, (1911), *Pioneer Irr. Dist. v. Walker*, 20 Idaho 605, 119 P. 304 (1911), *Tingwall v. King Hill Irr. Dist.*, 66 Idaho 76, 155 P.2d 605 (1945); *Nampa & Meridian Irr. Dist. v. Briggs*, 27 Idaho 84, 147 P. 75 (1915); *Stephenson v. Pioneer Irr. Dist.*, 49 Idaho 189, 288 P. 421 (1930).

that such irrigation districts operate in a proprietary rather than a public capacity.⁶

B. The representation proceeding before the Board

Following a petition filed by the Union, and a hearing during which the District claimed that it was exempt from the Act as a political subdivision of the State of Idaho, the Board directed an election to be conducted among the District's employees in the appropriate unit (R. 15-16). The Union won the ensuing election on December 19, 1970. On December 30, 1970, the Regional Director for the Nineteenth Region certified the Union as the exclusive bargaining representative for the employees in that unit. (R. 33; 20).

C. The unfair labor practice proceeding

Following the election, the Union, on December 23, 1970, requested the District to bargain with it collectively (R. 23). On December 28, 1970 and at all times thereafter, the District refused to bargain with the Union (R. 33). The General Counsel issued the complaint herein on January 13, 1971 (R. 33, 22-25).

In its answer to the complaint, filed on January 22, 1971, the District admitted that the Union was certified following a Board-conducted election; that the Union had requested collective bargaining; and that the District had refused the Union's request. (R. 33, 26). However, the District denied the allegations that its refusal to bargain violated Section 8(a)(5) and (1) of the Act, alleging that it was a "political subdivision" of Idaho as that term is used in Section 2(2) of the Act, and therefore exempt from the Act's coverage (R. 34; 26).

⁶ See cases cited *supra*, p. 5, n. 5.

On February 12, 1971, the General Counsel filed a "Motion to the Board for Summary Judgment" (R. 33; 28-30). On February 24, 1971, the Board issued an order transferring the proceeding to the Board and directing the District to show cause why the General Counsel's Motion should not be granted. (R. 33; 31). The District having failed to file a response, the Board found that there were no circumstances requiring a hearing and granted the General Counsel's motion for summary judgment. (R. 35).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the basis of the record above, the Board found that the District had violated Section 8(a)(5) and (1) of the Act. (R. 37-38). The Board's order requires the District to cease and desist from engaging in the unfair labor practices found, and from in any like or related manner interfering with the employees' rights under Section 7 of the Act (R. 40-41). Affirmatively, the Board's order directs the District to bargain with the Union upon request and to post appropriate notices (R. 41).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE DISTRICT IS AN "EMPLOYER" WITHIN THE MEANING OF SECTION 2(2) OF THE ACT.

Section 2(2) of the Act provides, in relevant part, "The term 'employer' . . . shall not include . . . any state or political subdivision thereof. . . ." Before the Board the District contended that it was a political subdivision of the State of Idaho and, therefore, exempt from regulation under the Act. As we show below, the Board properly rejected this

contention upon finding that the District was neither created directly by the State, nor administered by State-appointed or publicly elected officials, and that its operations were not significantly different from those of enterprises in private industry, including utilities whose employees are entitled to the benefits of the Act.

The term "political subdivision" is not defined in the Act and its "legislative history does not disclose that Congress explicitly considered its meaning." *N.L.R.B. v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604 (1971). However, it is clear that the Board has the authority and the duty of determining the first instance what is a "political subdivision" within the meaning of the Act and that its interpretation is entitled to great weight. *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee, supra*, 402 U.S. at 605; *N.L.R.B. v. Randolph Electric Membership Corporation*, 343 F.2d 60, 62 (C.A. 4, 1965). As the Board recently declared in *Natchez Trace Electric Power Association*, 193 NLRB No. 144, 78 LRRM 1433 (1971):

"In determining whether an entity falls within the meaning of [Section 2(2) of the Act], the Board inquires into whether the entity either (1) was created directly by the State, so as to constitute a department or administrative arm of the government, or (2) is administered by individuals who are responsible to public officials or to the general public."

Accord: *Fayetteville-Lincoln County Electric System*, 183 NLRB No. 19, 74 LRRM 1278 (1970); *Mobile Steamship Ass'n.*, 8 NLRB 1297, 1305, 1318 (1938), and *Oxnard Harbor District*, 34 NLRB 1285, 1289-1290 (1941). However, where both factors are absent, the Board has asserted jurisdiction. *N.L.R.B. v. Randolph Electric, supra*, 343 F.2d at 63; *Truckee-Carson Irrigation District*, 164 NLRB 1176 (1967). In determining whether those criteria are met, the Board has given consideration to

state statutes and their interpretation by state courts. *International Brotherhood of Electrical Workers*, 87 NLRB 99, 100-101 (1949).⁷

Thus, applying the two criteria, the Board held the Section 2(2) exemption applicable in *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954) (not officially reported), and in *New Bedford, Wood's Hole, Martha's Vineyard, Etc., Steamship Authority*, 127 NLRB 1322, 1326-1327 (1960). The first case involved a Turnpike Authority created by the legislature of the State of New Jersey for the purpose of constructing, operating and maintaining turnpike projects, and consisting of three members appointed by the Governor, with the advice and consent of the State Senate (33 LRRM 1528). Similarly, in *New Bedford*, the Board concluded that the Steamship Authority was exempt under Section 2(2) in view of the Governor's authority to appoint and remove its five members, the statutory requirements that the Authority file an annual report to the Governor and the Massachusetts legislature; that the State auditor annually audit its books; and that the State pay certain deficiencies arising from the Authority's operations. Finally, the Board noted the Massachusetts legislative declaration that "the operation and maintenance of the [project] will constitute the performance of essential governmental functions." (127 NLRB at 1324). Accord: *Fayetteville-Lincoln County Electric System*, *supra*. It is plain that "[t]he Board has long required the existence of at least one of these two factors for the Section 2(2) exemption to be applicable" *N.L.R.B. v. Randolph Electric Membership Corporation*, 343 F.2d at 63, n. 7. See also *Natural Gas Utility District*, *supra*, 402 U.S. at 604-605.

⁷ In *International Brotherhood of Electrical Workers*, *supra*, the Board held that the Board of Education of the city of Owensboro was a political subdivision of the State of Kentucky and thus was exempt under Section 2(2) of the Act. In reaching this conclusion, the Board looked to holdings of the State's courts that under Kentucky's constitution and statutes, schools and school boards exercised a State function, were composed of State officers, and held State property (87 NLRB at 100).

In the instant case, the Board reasonably concluded that the District lacks the essential attributes of a "political subdivision." The District is not a public body created by the State of Idaho. Instead, the District's creation was initiated by a petition of landowners of the proposed district, followed by a hearing before the Board of County Commissioners who approved the proposed district. The role of the State in this regard is limited to examination of the petition by its Department of Reclamation which renders a recommendation to the Board of County Commissioners. Thus, as the Board observed, "the District would appear to be no more a direct creation of the State than such privately owned public companies as railroads and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity" (R. 13).

Nor is the District governed by State-appointed or publicly elected officials. For as we have shown, the District's Directors were not elected by all citizens qualified to vote in public elections,⁸ but by a special class of voters, the landowners. The directors themselves, without any governmental participation, are empowered to fill vacancies on the Board, and the eventual determination as to the continuance of the District remains in the hands of the member-landowners. Moreover, the record discloses no general ouster law for State officials which is applicable to the District's directors; nor is there provision for their removal in the Idaho Code sections pertaining directly to irrigation districts. Finally, as noted *supra*, p. 4, the record is clear that the District's own manager who is solely responsible to the Board of Directors conducts its day-to-day affairs free from State intervention.⁹

⁸ Compare *Oxnard Harbor District*, *supra*, 34 NLRB at 1289-1290.

⁹ Although the District is apparently required to file annual financial reports with the State Auditor (Code 67-1019, S.A. 31-32) and County Commissioners have the right to inspect the District's books (Code 43-325, S.A. 14-15), public utilities are also subject to a similar requirement (Code 61-405, 61-610, S.A. 27-29).

Another significant factor which the Board properly considered was the repeated declaration of the Idaho Supreme Court that: "It is well settled in this jurisdiction that an irrigation district is not strictly speaking, a municipal corporation, but a quasi-municipal corporation operating its irrigation system in a proprietary capacity, and such municipal powers as it may have are only secondary or incidental." *Tingwall v. King Hill Irrigation District*, 66 Idaho 76, 155 P.2d 605, 606 (1945). Accord: *Nampa & Meridian Irrigation District v. Briggs*, 17 Idaho 84, 147 P. 75, 82 (1915); *Potlach Lumber Co. v. Peterson*, 12 Idaho 769, 88 P. 426 (1906). Indeed, that Court has so characterized the very entity under discussion herein. *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720, 722 (1933). These decisions have made it clear that the landowners are considered members of such corporations, control its affairs, and alone are benefitted by its operations.¹⁰ Although these State decisions are, of course, not binding on the Board in determining the status of the District under federal law, they are entitled to "careful consideration" as relevant factors. See *N.L.R.B. v. Natural Gas Utility District, supra*, 402 U.S. at 602.

¹⁰ Before the Board the District contended that the Idaho decisions did not take into account certain added municipal functions, such as the power to maintain parks and the operation and maintenance of garbage disposal programs. However, only garbage disposal removal has been added to the District's powers by State statute after the *Tingwall* case, *supra* (Code 43-1901, S.A. 24), which held that utility districts, though quasi-municipal corporations, were operated primarily in a proprietary capacity. This is, scarcely, we submit, a sufficient change in view of the fact that the District already performed other municipal functions in 1945, at the time of *Tingwall*, such as operation of recreational facilities, camping facilities, and park facilities (Code 43-32, 16, 326, S.A. 15). Moreover, the Idaho Supreme Court reaffirmed the principle of the above cases in 1954, notwithstanding the District's exemption from taxation under Chapter 1, Title 63, Idaho Code (Resp. Ex. 17, S.A. 29-30, n. 1) in *Jensen v. Boise-Kuna Irrigation District*, 75 Idaho 133, 269 P.2d 755, 759 (1954). Additionally, these facilities are paid for not from taxes but from user charges.

Beyond its independent origin, autonomy, and the declarations of the State Supreme Court, the District's operations resemble other privately operated utilities. Thus, it sells water and services to consumers, hires its own employees to perform services, and sets their terms and conditions of employment. Unlike State employees, the District's employees are not covered by any Idaho State Public Retirement program (Tr. 56). Further, the District enjoys the usual powers of a private corporation, including the rights to sue and be sued, lease, purchase and sell, convey and mortgage property, incur obligations, issue bonds, enter into contracts, in fact to "do any and every lawful act necessary to be done that sufficient water may be furnished to each landowner in said district for irrigation purposes" (Code 43-304, S.A. 9-11). Moreover, the District is liable in tort for negligent construction and operations of any canal system it constructs, notwithstanding its possession of some governmental powers. *Stephenson v. Pioneer Irrigation District*, 49 Idaho 189, 288 P. 421 (1930). And although it can levy assessments under certain limited conditions against lands in the district (Code 43-321, S.A. 12-14), it does not possess any general taxing power.

That Idaho has delegated the power of eminent domain to the District, has immunized it and bonds issued by it from taxation by the State or its public subdivisions, and has permitted it to make assessments on property to raise money for its operation, are not determinative factors in this case. With respect to eminent domain, legislatures have frequently delegated that power to privately owned and operated public service utilities to enable them to carry out their operations effectively.¹¹ Moreover,

¹¹ See, e.g., *A. W. Cline v. Kansas Gas and Electric Co.*, 260 F.2d 271, 273 (C.A. 10, 1958); *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (C.A. 5, 1950), cert. denied, 349 U.S. 829; *North Carolina Public Service Co. v. Southern Power Co.*, 282 Fed. 837, 844 (C.A. 4, 1922), writ of certiorari dismissed, 263 U.S. 508 (1924); *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N.C. 52, 175 S.E. 698, 703 (1934); *Berry v. Southern Pine Electric Power Corp.*, 222 Miss. 260, 76 So.2d 212, 214 (1954); *Alabama Power Co. v. Cullman County Membership Corp.*, 234 Ala. 396, 174 So. 866 (1937).

as the Board noted, the Idaho Code grants the right of eminent domain to many entities other than subdivisions of the state such as pipe lines, telephone companies, farmers, railroads, and various public service-type companies (R. 13; Code 7-701, S.A. 25-26). Similarly, legislative grants of tax exemption on property are often made to privately owned utilities.¹² Indeed, Idaho has admittedly exempted privately owned property from taxation to “further the public welfare”, *Sunset Memorial Gardens v. Idaho State Tax Commission*, 327 P.2d 766, 772 (1958). Finally, with regard to assessments, the Idaho Supreme Court has made it very clear that assessments against property owners in special districts are in effect based on benefits to the landowners within the district and advance the primary proprietary interests of such a district rather than quasi-governmental functions it may perform. *Booth v. Clark*, 42 Idaho 284, 244 P. 1099 (1926). *Indian Cove Irrigation District v. Prideaux*, 25 Idaho 112, 136 P. 618, 621 (1913). In any event the district’s enjoyment of these powers does not outweigh those factors which the Board found controlling. Cf. *City of Paris, Kentucky v. Federal Power Commission*, 399 F.2d 983, 986 (C.A.D.C., 1968).

Finally, that the Federal Security Administration, in 1950 and thereafter, considered the District to be a political subdivision for purposes of social security coverage (Tr. 48-49, RX 6) does not bind the Board. For the Board is free to make its own determination as to whether it has jurisdiction over an employer and is not bound by the rulings of other federal agencies interpreting provisions of different statutes, *N.L.R.B. v. Randolph Electric Membership Corp.*, *supra*, 343 F.2d at 64-65.

¹² *Byrd v. Blue Ridge Electric Corporation, Inc.*, 215 F.2d 542, 546-547 (C.A. 4, 1954), cert. denied, 348 U.S. 915 (1955); *Bush v. Aiken Electric Corporation, Inc.*, 226 S.C. 442, 85 S.E. 716, 718 (1955); Cf. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959) and cases cited therein.

Review of the foregoing reveals substantial distinctions between the instant case and the recent *Natural Gas Utility District* case, in which the Supreme Court, applying the Board's standard, found that entity to be administered by individuals who are responsible to the general public and therefore, a "political subdivision" within Section 2(2) of the Act. (402 U.S. at 608). Thus, unlike the instant case, the *Utility District* officials were appointed by an elected county judge who also had power to fill vacancies where the remaining directors could not agree on a new director (402 U.S. 607-608). Further, in contrast with the *Utility District* case where the Supreme Court found a State General Ouster Law applicable (402 U.S. at 607), there appears to be no ouster provision under Idaho Law applicable to the District's directors. Other significant factors, not present here, which weighed in the Supreme Court's decision were that the highest State court and the legislature had declared the utility districts to be municipalities (402 U.S. at 602, 606), and that among other powers, the utility districts enjoyed subpoena power and eminent domain against public land (402 U.S. at 606, 608).

In sum, the Board's determination in the instant case fully accords with its well established and judicially accepted standard and is therefore entitled to this Court's acceptance. Accordingly, the District's employees are fully entitled to the benefits of the Act.

CONCLUSION

For the reasons stated, we respectfully request that a decree be entered enforcing the Board's order in full.

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SUPPLEMENTAL APPENDIX

The relevant provisions of the Idaho Code are as follows:

TITLE 43

IRRIGATION DISTRICTS

* * * * *

43-101. Who may propose organization.—Whenever fifty, or a majority, of the holders of title, or evidence of title, to lands susceptible of one or more modes of irrigation from the same or different sources and by the same or different systems of works, desire to provide for the irrigation of the same, or when for other reasons they desire to organize the proposed territory into one district, they may propose the organization of an irrigation district under this title: provided, said formation into one district meets with the approval of fifty, or a majority of the holders of title, or evidence of title, to lands in each of the communities affected: provided, further, said holders of title or evidence of title shall hold such title or evidence of title to at least one-fourth part of the total area of the land in the proposed district, exclusive of state and government land which will be assessable for the purposes of the district. The equalized county assessment roll next preceding the presentation of a petition for the organization of an irrigation district shall be sufficient evidence of title for the purpose of this title, but other evidence may be received, including receipts or other evidence of the rights of entrymen on lands under any law of the United States or of this state, and such entrymen shall be competent signers of such petition, and the lands on which they have made such entries shall, for the purposes of said petition,

be considered as owned by them [1903, p. 150, § 1; am. 1907, p. 484, § 1, subd. 1; reen. R.C. & C.L., § 2372; C.S., § 4313; am. 1921, ch. 237, § 1, p. 529; I.C.A., § 42-101.]

43-102. Petition for organization.—A petition shall be first presented to the board of county commissioners of the county in which the greatest proportion of the proposed district is situated, signed by the required number of holders of title or evidence of title to the required area of such proposed district, evidenced as above provided, which petition shall set forth and describe, with the degree of certainty required by law in a tax roll, all the lands proposed to be included in said district, and shall state whether it is proposed to purchase irrigation works already in operation or to construct new works, or as the case may be, and shall pray that the same be organized into an irrigation district. The petition, together with all maps, cross-sections and papers filed therewith, shall, at all proper hours, be open to public inspection at the office of the clerk of the board of county commissioners between the date of their said filing and the date of the final hearing thereon. [1903, p. 150, part of § § 2, 3; am. 1907, p. 484, § 1, subd. 2, and last part of subd. 3; compiled R.C. & C.L., § 2373; C.S., § 4314; I.C.A., § 42-102.]

43-103. Maps and water supply data.—If it be proposed by said petition to construct new works for the irrigation of said lands, or to purchase works only partially completed and not yet in operation, the petitioners must accompany the petition with a map of the proposed district. Said map shall show the location of the proposed canal or other works by means of which it is intended to irrigate the proposed district, and all the canals situated within the boundaries of the proposed district:

S.A.3

provided, that canals that only pass through said lands and which do not in fact irrigate any of the same need not be shown. If said water supply be from natural streams, the flow of said stream or streams shall be stated in terms of cubic feet per second. If the water supply for said district is to be gathered by storage reservoirs, said map shall show the location of said proposed reservoirs, and shall give their capacity in acre feet. Said map shall be drawn to a scale of two inches to the mile. Cross sections of the proposed canal, and all canals existing within the boundaries of said proposed district and shown on said map, and all proposed dams and embankments, shall be given in sufficient number to show the contemplated mode of construction, and the capacity shall be given in cubic feet per second of the proposed and said existing canals. Such cross sections shall be drawn to a scale of ten feet to the inch, and said map and cross sections, together with an estimate of the cost of such works, shall be certified to by a well-known and competent irrigation engineer. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1, reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374; C.S., § 4315; I.C.A., § 42-103.]

43-104. Bond.—The petitioners must also accompany the petition with a bond, to be approved by the said board of county commissioners, in double the amount of probable cost to the county of organizing such district, conditioned that the bondsmen will pay all said costs, in case said organization be not effected. [1903, p. 150, § 2a, as added by 1907, p. 484; § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374a; C.S., § 4316; I.C.A., § 42-104.]

43-105. Notice of presentation to commissioners.—Such petition may be filed with the clerk of the board of county commissioners at any time, and on such filing said clerk shall publish a general notice that (giving the first name on the petition) and others have filed a petition for the organization of an irrigation district. If it be proposed in said petition to construct a new canal system, such notice shall state that fact and give the numbers of the sections in which the lands are situated which it is proposed to include in said district, but if it is proposed to purchase a canal already in operation, the notice shall state that fact and give the name by which such canal system is generally known, and shall state that the lands covered by said canal system are the lands proposed to be included in such district. The notice shall further state the time at which such petition will be presented to the board of county commissioners, which time shall be during a regular meeting of said board or a special meeting called for that purpose, and such notice shall be published two weeks before the day on which the same is to be presented, and if any portion of such proposed district be within another county or counties, then said notice shall be published in a newspaper published in each of said counties. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374b; C.S., § 4317; I.C.A., § 42-105.]

43-106. Notice of hearing.—When such petition is presented, the said board shall set a time for a hearing upon the same, which time shall not be less than four nor more than eight weeks from the date of presentation. A notice of the time of such hearing shall be published in a newspaper published within each of the counties in which any part of

said district is situated. [1903, p. 105, § 2a, as added by 1907, p. 484; § 1, reen. R.C., § 2374, am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; reen. C.L., § 2374c; C.S., § 4318; I.C.A., § 42-106.]

43-107. Examination by department of reclamation—Report to county commissioners—Amendment of plan.—A copy of such petition and all maps and other papers filed with the same shall be filed in the office of the department of reclamation at least four weeks before the date set for such hearing. It shall be the duty of the department to examine such petition, maps and other papers and if it deem it necessary, to further examine the proposed district, the works proposed to be purchased, or the location of the works to be constructed, and it shall prepare a report upon the matter in such form as it deems advisable, and submit the same to the board of county commissioners at the meeting set for the hearing of said petition. Whenever the department of reclamation shall report to the board of county commissioners against the organization of such district, said board of county commissioners shall refuse to further consider such petition unless it be requested in writing so to do by three-fourths of the landowners in said proposed district, such ownership to be determined as provided in section 43-101. At the time set for hearing the board may, on receiving an adverse report from the department, adjourn the proceedings for two weeks for the purpose of enabling the petitioners to file a request for such further proceedings. In any case, the petitioners may amend such plan of irrigation at such hearing to meet the approval of the department, or as they may find advisable. It shall be the duty of the county commissioners to notify the department of reclamation of the final action, either favorable or unfavorable taken

upon a petition for the formation of an irrigation district. [1903, p. 150, § 2a as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; compiled and reen. C.L., 2374; C.S., § 4319; am. 1921, ch. 172, § 1, p. 367; I.C.A., § 42-107.]

Compiler's note. Section 2 of S.L. 1921, ch. 172 repealed all conflicting laws.

43-108. Order of board.—When they shall have determined to proceed with the matter, said board may adjourn such hearing from time to time, not exceeding four weeks in all, and on final hearing may make such changes in the proposed boundaries as they may find proper, and shall make an order on their records describing the lands which they shall have determined to include in said district, and stating that such lands will be organized into an irrigation district if the vote of the electors thereafter to be taken on the proposition shall be favorable to such organization: provided, that any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board upon application by him, have such lands included in said district. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R.C., § 2374; am. 1915, ch. 89, § 1, part of subd. 2374, p. 207; compiled and reen. C.L., § 2374e; C.A., § 4320; I.C.A., § 42-108.]

43-109. Divisions of district for election of directors.—Such board shall also make an order dividing the district into not less than three nor more than seven divisions of as nearly equal size as practicable, which shall be numbered first, second, third, etc., and one director, who shall be an elector and resident in the division, shall be elected from each division of the district at large. The number of divisions into which said district shall be divided shall be specified in the petition for the

organization of the district, and if not otherwise specified shall be three. [1903, p. 150, § 2a, as added by 1907, p. 484, § 1; reen. R. C., § 2374; am 1915, ch. 89, § 1, last part of subd. 2374, p. 207; reen. C.L., § 2374f; C.S., § 4321; I.C.A., § 42-109.]

43-110. Notice of election. — Said board shall then give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of this title. Such notice shall describe the lands in said district with the certainty required in an ordinary deed and shall state the name of the proposed district as designated by the board of commissioners, and shall state that a map showing the lands in said district is on file in the office of the Board of county commissioners, which map, if not previously made as required herein, shall be made by the petitioners after the determination of said commissioners of the question of what lands shall be included in the proposed district, and if previously made, lands added to said district or deducted therefrom by the board may be indicated thereon. Said notice shall be published for four weeks prior to such election, in a newspaper published within each of said counties as aforesaid. Such notice shall require the electors to cast ballots which shall contain the words “Irrigation district—yes,” or “Irrigation district—no,” or words equivalent thereto, and also the name of one person from each such division for director of said district. [1903, p. 150, § 2b, as added by 1907, p. 484, § 1; reen. R. C., § 2375; am. 1915, ch. 49, § 1, first part of subd. 2375, p. 136; reen. C. L., § 2375; C. S., § 4322; I. C. A., § 42-110.]

43-111. Qualifications of voters. — No person shall be entitled to vote at any election held under the provisions of this title for the purpose of

determining whether indebtedness shall be created or bonds issued by the district, or for any other purpose, unless he shall possess all the qualifications required of electors under the general laws of the state, and own land within the district, or the proposed district, and be a resident of the county in which the district, or a portion thereof, is located. [1903, p. 150, §2b, as added by 1970, p. 484, §1; reen. R.C., §2375; am. 1915, ch. 49, §1, last part of subd. 2375, p. 136; reen. C.L., §2375a; C.S., §4323; I.C.A., §42-111; am. 1933, ch. 27, §1, p. 36; am. 1951, ch. 27, §1, p. 39.]

43-112. Conduct of elections. — Such election shall be conducted as nearly as practicable in accordance with the general laws of the state: provided, no particular form of ballot shall be required, and that the provisions of the election laws as to the form and distribution of ballots shall not apply.

Said board of county commissioners shall establish one or more election precincts, not exceeding seven, as may be necessary, and define the boundaries thereof, which boundaries, when the district is divided into precincts, shall be the same as the division boundaries above-provided for and which said precincts may thereafter be changed by the board of directors of such district as may be necessary: provided, that districts containing more than 10,000 acres shall have not less than three, nor more than seven voting precincts.

Said board shall also appoint three judges of election for each such election precinct, who shall perform the same duties as near as may be as judges of election, under the general laws of the state. [1903, p. 150, §3; am. 1970, p. 484, §1; R.C., §2376; am. 1915, ch. 47, §1.]

* * * * *

43-209. Vacancies.— In case of a vacancy in the office of director the vacancy shall be filled by appointment by the remaining members of the board from the division in which the vacancy occurred. An officer appointed to fill a vacancy as above provided shall hold his office until the next regular election for said district, at which election a director shall be elected for the remainder of the unexpired term. [1903, p. 150, part of §6; am. 1970, p. 484, §1, part. of sbud. 6; reen. R.C., §2380; am. 1915, ch. 87, §1, p. 205; reen. C.L., §2380b; C.S., §4338; I.C.A., §42-209.]

* * * * *

43-304. General powers of board—By-laws—Right of entry—Acquisition of property.— Said board shall have the power to manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required and prescribe their duties, to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same, which said by-laws, among other things, shall establish a fiscal year; and in case the by-laws do not provide for the establishment of a fiscal year, the fiscal year shall commence the first day of November and end the thirty-first day of October of each and every year. Said by-laws, rules and regulations must be printed in convenient form for distribution throughout the district.

The board and its agents and employees shall have the right to enter upon any land and to make surveys, and may locate the necessary irrigation

works and the line of any canal or canals, and the necessary branches for the same on any lands which may be deemed best for such location.

Said board shall also have the right to acquire, either by purchase, condemnation or other legal means, all lands and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment. Said board may also construct the necessary dams, reservoirs and works for the collection of water for said district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each landowner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this title, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this title, is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law.

The board of directors of an irrigation district organized under the laws of the state of Idaho may enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes. [1903, p. 150, §12a, as added by 1907, p. 484, §1, subd. 12a; reen. R.C., §2386; am. 1911, ch. 71, §1, p. 194; am. 1911, ch. 154, §5, p. 461; am. 1915, ch.

143, §4, p. 308; reen. C.L., §2386; am. 1919, ch. 15, §1, p. 78; C.S., §4346; I.C.A., §42-304.]

* * * * *

43-316. Legal title to property.— The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided. [1903, p. 150, §13; reen. R.C. §2387; am. 1915, ch. 143, §3, p. 304; reen. C.L., §2387; C.S., §4350; I.C.A., §42-311.]

Compiler's note. Amendatory matter of 1915 transferred to 167:14 in C.L. (§43-1814 herein), relating to cooperation with federal reclamation service.

Cited in: (In brief of counsel) Colburn v. Wilson, 23 Idaho 337, 130 Pac. 381; Yaden v. Gem Irr. Dist., 37 Idaho 300, 216 Pac. 250; Lewiston Orchards Irr. Dist. v. Gilmore, 53 Idaho 377, 23 Pac. (2d) 720.

43-317. Conveyance of property—Actions.— The said board is hereby authorized and empowered to take conveyance or other assurances for all property acquired by it under the uses and provisions of this title, in the name of such irrigation district, to and for the purposes herein expressed; and to institute and maintain any and all actions and proceedings, suits at law and in equity, necessary or proper in order to fully carry out the provisions of this title, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by this title, or acquired in pursuance thereof. In all courts, actions, suit or proceedings the said board may sue, appear and defend, in person or by attorneys, and in the

name of such irrigation district. [1903, p. 150, §14; reen. R.C. & C.L., §2388; C.S., §2388; C.S., §4351; I.C.A., §42-312.]

* * * * *

43-321. Special assessments—Elections—Collection of assessments—

Delinquent list.— The board of directors may, at any time when in their judgment it may be advisable, call a special election and submit to the qualified electors of the district the question whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this title, and shall, at the same time, fix a date upon which such assessment shall become delinquent, which date shall be not less than sixty days nor more than ninety days from the date of said meeting of said board. Such election must be called upon the notice prescribed, and the same shall be held, and the result thereof determined and declared, in all respects in conformity with the provisions of section 43-401. The notice must specify the amount of money proposed to be raised, and the purpose for which it is intended to be used. At such elections the ballots shall contain the words “Assessment——— yes” or “Assessment ———— no.” If two-thirds or more of the votes cast are “Assessment ———— yes,” the board shall immediately levy an assessment, sufficient to raise the amount voted.

The assessment so levied shall be computed and entered on the assessment roll by the secretary of the board, and within ten days after such assessment, the secretary must deliver the assessment book to the treasurer of the district who shall, within ten days after receipt of such

book, publish a notice in a newspaper published in each county in which any portion of the district may lie, that said assessments are due and payable and will become delinquent at six o'clock p.m. of the day fixed by the board of directors, naming such day and date, and also the times and places at which the payment of the assessment may be made; which notice shall be published for a period of two weeks.

The treasurer must attend at the times and places specified in the notice to receive assessments which must be paid in lawful money of the United States. Within fifteen days after the delinquent date as fixed by the board of directors, said treasurer shall begin the preparation of the delinquent list, which delinquent list shall contain a description of all the tracts of land upon which such special assessments are delinquent, and the amount of such assessment against each of the said tracts, and the name of the owner as shown on the assessment book. And on or before thirty days thereafter, the treasurer shall complete said delinquent list, shall properly certify the same, and prepare a duplicate thereof; and deliver the delinquent list to the secretary of the district. At the same time the treasurer must commence to publish the delinquent list and publication shall continue three weeks and must contain the names of the owners, a description of the property delinquent at that time, the amount of assessments and penalties and the costs due, opposite each name and description. After said publication shall have been made for the first time the treasurer shall collect twenty-five cents in addition to the assessment and penalties on each description of lands published. The treasurer must append and publish with the delinquent list a notice that unless the assessments delinquent, together with penalties and costs, are paid, the real

property upon which said assessments are made will be sold at public auction on the first Tuesday in September following date of notice. The publication must be made in some newspaper published in the district, if it can not be so published, then in some newspaper published in the county in which the office of the board of directors is situated; and if it can not be so published, then by posting in not less than three places in said district, one of which shall be at the door of the office of said board of directors.

The place of such sale shall be at the office of said board of directors. The treasurer, as soon as he has made the publication required, must file with the secretary proof of such publication by affidavit, or like proof of posting in case such notice was posted as herein required. Such sales and all proceedings thereafter shall be in accordance with the provisions of sections 4392 to 4401, both inclusive, of Idaho Compiled Statutes, where not in conflict herewith.

When collected such assessments shall be paid into the district treasury for the purposes provided in the notice of such special election. [1903, p. 150, §40; reen. R.C. & C.L., §2391; C.S., §4354; am. 1921, ch. 234, §1, p. 524; I.C.A., §42-316.]

* * * * *

43-325. County commissioners to have access to books.— Any board of directors of any such irrigation district, or the secretary thereof, shall at any time allow any member of the board of county commissioners, when acting under the order of such board, to have access to all books, records and vouchers of the district which are in possession or control of

said board of directors or said secretary of said board. [1903, p. 150, §58; reen. R.C. & C.L., §2395; C.S., §2395; C.S., §4358; I.C.A., §42-320.]

43-326. Power to maintain parks.— The board of directors of any irrigation district shall have the power to maintain public parks and recreation grounds for the benefit of the people of the district and may set aside for this purpose, land belonging to the district, including land acquired by the district from sale for delinquent water assessments. The district shall have power to purchase land within the district for public parks and recreation ground. In the maintenance of said grounds, the board of directors may construct buildings and provide facilities for recreation purposes and may receive gifts and donations of either real or personal property for the purposes hereinbefore enumerated. [I.C.A. §42-322, as added by 1935, ch. 11, §1, p. 26.]

* * * * *

43-401. Plan of construction—Issuance of bonds—Election. — As soon as practicable after the organization of any such district the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations, in which it shall state what constructed works or other property it proposes to purchase and the cost of purchasing the same; and further what construction work it proposes to do and how it proposes to raise the funds for carrying out said plan. For the purpose of ascertaining the cost of any such construction work, said board shall cause such surveys, examinations and plans to be made as shall demonstrate the practicability of such plan, and furnish the proper basis for an estimate of the cost of carrying out the same. All

such surveys, examinations, maps, plans and estimates, shall be made under the direction of a competent irrigation engineer and certified by him. Said board shall then submit a copy of the same to the department of reclamation, and within ninety days thereafter the department shall file a report upon the same with said board, which report shall contain such matters as, in the judgment of the department may be desirable.

Upon receiving said report said board of directors shall proceed to determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of said district possessing the qualifications hereafter prescribed the question whether or not the bonds of said district, or the right to enter into an obligation with the United States in the manner hereinafter in this title provided, in the amount as determined, shall be authorized.

Notice of such election must be given by posting notices in three public places in each election precinct in said district at least four weeks before the date of said election, and the publication thereof for the same length of time in some newspaper published in the district, and in case no paper is published in the district, then in a paper published in each county in which the district or any part thereof is located. Such notice must specify the time of holding the election, the qualifications of voters, the amount of bonds proposed to be issued, and, in case such maps and estimates have been made, it shall further state that copies thereof, and in all cases it shall state that said report of the department of reclamation, are on file and open to public inspection by the people of the district, at the office of said board and at the office of the department of reclamation at the state capitol.

No person who is not a resident * * * *holder of title or evidence of title* to lands located and subject to assessment within such district, or the wife or husband of such * *holder of title or evidence of title*, shall be entitled to vote at such election. Otherwise said election must be held and the results thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this title governing the election of officers: provided, that no informalities in conducting such an election shall invalidate the same if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words “bonds—yes” or “bonds—no,” or other words equivalent thereto. If two-thirds of the votes cast are “bonds—yes” the board of directors shall cause bonds in said amount to be issued; if more than one-third of the votes cast at any bond election are “bonds—no” the result of such election shall be so declared and entered of record.

And whenever thereafter said board in its judgment deems it for the best interest of the district that the question of the issuance of bonds in said amount, or any other amount, shall be submitted to the electors, it shall so declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election. [1903, p. 150, §15; am. 1907, p. 484, §1, subd. 15; reen. R.C., §2396; am. 1915, ch. 143, §5, p. 304; compiled and reen. C.L., §2396; C.S., §4359; am. 1929, ch. 177, §1, p. 311; I.C.A., §42-401; am. 1959, ch. 223, §1, p. 488.]

* * * * *

43-701. Preparation of assessment book—Levy of assessments.— The secretary of the board of directors shall be the assessor of the district,

and on or before August fifteenth of each year shall prepare an assessment book containing a full and accurate list and description of all of the land of the district, and a list of the persons who own, claim or have in possession or control thereof during said year, giving the number of acres listed to each person: provided, that where the property to be listed is described by metes and bounds description, the assessor of the district may give to each tract of land within the district which is described by metes and bounds description an irrigation district assessment number, which number shall be placed on the assessment roll to indicate the certain piece of land bearing such number, and entered on a plat book to indicate what tract is designated by such irrigation district assessment number, and no further description of such land shall be necessary upon the irrigation district assessment roll. The assessor of the district must, in the event irrigation district assessment numbers are used in lieu of the metes and bounds description, on or before the fifteenth day of August of each year, file with the board of directors of the district an accurate and complete list of all irrigation district assessment numbers entered on the assessment rolls for the year, showing opposite each number an accurate description of the tract of land designated by such number. Thereafter, in all cases where an irrigation district assessment number is used to designate the same tract of land in the assessment of succeeding years, the assessor of the district shall not include such number in his list of the irrigation district assessment numbers filed with the board of directors of the district. Whenever a tract of land which has been given an irrigation district assessment number is subdivided, the assessor of the district shall give each subdivision a new irrigation district assessment number, which number, with an accurate description of the tract of land

designated by such new number, shall be included in his list of irrigation district assessment numbers filed with the board of directors: and provided, that in all irrigation districts where the collection of assessments is made by county officers as provided for by sections 43-727, 43-728 and 43-729, said assessment book shall be prepared on or before June fifteenth of each year and the provisions of this section with reference to assessment numbers shall not apply. If the name of the person owing [owning] claiming, possessing or controlling any tract of said land is not known, it shall be listed to unknown owners.

In all districts in which an assessment is levied for the purpose of maintaining and operating the works of said district, the board of directors shall meet at the office of the district on the third Tuesday of August of each year and proceed to levy an assessment upon all the lands of the district for expense of maintaining and operating the property of the district: provided, that in all districts where the collection of assessments is made by county officers as provided for by sections 43-727, 43-728, and 43-729, said levy shall be made on or before the third Tuesday of July of each year.

At the time of meeting of the board of directors to levy assessments as in this section provided, the board of directors of the irrigation district are authorized to determine the aggregate amount necessary to be raised for all purposes connected with the maintaining and operating of the works of said district, and may determine the total amount of said sum necessary and required to pay the expense of making the assessment book and extension of the assessments thereon, giving notice of assessments and making collections of assessments, which shall be

designated as operation and maintenance fund. The board of directors are authorized to apportion the total amount of assessment expense fund against the several tracts of land as shown on the assessment book, so that each tract shall pay its proportionate share of the cost of making assessments and collections thereof. The amount of said assessments designated operation and maintenance fund shall be spread upon all the lands in the district and shall be proportionate to the benefits received by such lands growing out of the maintenance and operation of the said works of said district. Such assessments shall be carried out by the secretary and entered into an appropriate column on the assessment roll immediately and shall be subject to review by the board of correction, hereinafter provided for.

In districts that furnish water to landowners who have previously petitioned out of such district, the board of directors shall assess such owners in the same proportionate amount for maintenance and operation of the irrigation works of the district as they do on the land within such district, and in addition thereto shall assess such landowners in the same proportionate amount for bond interest and redemption of bonds outstanding under the provisions of chapters 4, 5, and 6, of this title, or other contract indebtedness of the district, as they do against the land of the district, and such assessment shall be considered as a toll, and if not paid by the first day of January following such assessment, the board of directors may refuse to deliver water to such landowner until this, or any other delinquent payment, has been paid. [1903, p. 150, §23; reen. R.C., §2407; am. 1911, ch. 71, §4, p. 194; am. 1911, ch. 154, §9(8), p. 461; reen. C.L., §2407; C.S., §4384; am. 1931, ch. 125, §1, p. 221; I.C.A.,

§42-701; am. 1941, ch. 93, §1, p. 170; am. 1945, ch. 126, §1, p. 192; am. 1947, ch. 54, §1, p. 71.]

* * * * *

43-908. Right of eminent domain.— All irrigation districts organized under the laws of the state of Idaho shall have the right of eminent domain, with the power by and through their boards of directors, to cause to be condemned and appropriated in the name of and for the use of said districts, all lands, water rights, reservoirs, canals and works constructed or being constructed by private owners, and lands for reservoirs for the storage of needful waters, and all necessary appurtenances and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works. Said irrigation districts shall have the right by and through their boards of directors to acquire by purchase or other legal means, any or all of the property mentioned and referred to in this section. In any action or proceeding for the condemnation of any property mentioned and referred to in this section, wherein said irrigation district is a party, the plaintiff must, within six months after final judgment, pay the sum of money assessed, or said judgment will be annulled. Except as otherwise provided in this section, the provisions of the laws of Idaho relative to the right of eminent domain, civil actions and new trials and appeals, shall be applicable to, and constitute the rules of practice in, condemnation proceedings by said irrigation districts. [1907, p. 221, §§1, 2, 3, 4; reen. R.C. & C.L., §2422; C.S., §4410; I.C.A., §42-908.]

* * * * *

43-1301. Petition.— Whenever twenty-five or a majority of the land-owners in any irrigation district heretofore organized or hereafter to be organized so desire they may petition the board of directors to call a special election for the purpose of submitting to the qualified electors of such irrigation district a proposal to vote on the modification of such district by the exclusion of land within its boundaries or a proposal to vote on the dissolution of such district, or for the sale or transfer of its water rights, canal system and all or any other property or for dissolution and for sale or transfer, as the case may be. Such petition shall set forth the reasons for such proposal and in case it is proposed to modify said district by the exclusion of lands therein shall set forth particularly the land to be excluded and the reasons therefor. Such petition for modification or dissolution of the district or for such sale or transfer either shall state that all outstanding bonds, warrants and other obligations of every nature whatsoever, legal and enforceable, against said district have been fully satisfied and paid or shall set forth facts showing reasonable ground for the belief that the consent of the holders of all outstanding bonds, warrants and other obligations of the district, legal and enforceable, can be obtained, or that the district is able to satisfy all those not consenting. [R.C. §2437a, as added by 1917, ch. 167, §1, part of subd. 2437a; am. 1919, ch. 36, §1, p. 132; C.S., § 4428;

* * * * *

43-1309. Dissolution without election—Petition—Conditions.— An irrigation district may be dissolved without the holding of the election provided for by this chapter upon complaint or petition of parties holding and owning:

(a) Fifty per cent or more of the issued outstanding unpaid bonds of such district; or,

(b) Fifty per cent or more of all the land situated within the boundaries of such district; or,

(c) Claims, warrants, liens or other legal obligations of such district in an amount equal to not less than thirty per cent of the issued outstanding and unpaid bonds of such district.

It must be made to appear to the satisfaction of the court, by such complaint or petition, that any one or more of the following conditions exist in or as to said district:

1. That the district has been abandoned, or for two or more years last past has ceased to function, and there is little or no probability that it ever will or can function in future;

2. That no useful purpose exists for the further continuance of the organization of the district;

3. That there are not sufficient qualified electors residing within the boundaries of such district to hold a legal election. [C.C., §4435-A, as added by 1929, ch. 102, §1, p. 167; I.C.A., §42-1309.]

Compiler's note: The words "this which is compiled herein as §§43-1309—chapter" refer to S.L. 1929, ch. 102, 43-1313.

43-1057. Investment of certain funds authorized.— In addition to the authority conferred upon the board of directors of an irrigation district by section 57-601, such board shall have the authority to invest the surplus funds of such district, collected for the purpose of paying an

outstanding obligation to the United States of America or for the payment of outstanding bonds of said district or funds in an emergency fund created by the directors, in the negotiable, general obligation bonds or other evidences of indebtedness of the United States or of this state in lieu of depositing the same in designated depositories as provided by the Public Depository Law and to dispose of such bonds or evidences of indebtedness as and when said board may direct. [1943, ch. 153, §1, p. 309.]

* * * * *

43-1901. Authority conferred.— In addition to other powers and authorities any irrigation district now or hereafter organized under the laws of Idaho and having a contract or hereafter contracting with the United States under the Federal Reclamation Law (being the act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplemental thereto) may (a) contract with the United States for the construction, operation and maintenance of a domestic water system, and (b) enter into such other obligations and do such other things as are incidental to the construction and operation and maintenance of such system* *and (c) make provisions for the operation and maintenance of a garbage disposal program for the benefit of the residents. The cost of operation and maintenance of such garbage disposal program shall be paid from the district's current expese fund.* Service through such system may be provided both to lands within the district and to other lands that the district's board of directors determines can be served feasibly and economically. [1946 (1st E.S.), ch. 3, §1, p. 4; am. 1953, ch. 108, §1, p. 142.]

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TITLE 7

SPECIAL PROCEEDING

* * * * *

Chapter 7 — Eminent Domain

7-701. Uses for which authorized.— Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.
2. Public buildings and grounds for the use of any county, incorporated city, village, town or school district; canals, aqueducts, flumes, ditches or pipes for conducting water for use on state property or for the use of the inhabitants of any county, incorporated city, village or town or for draining state property for any county, incorporated city, village or town, raising the banks of streams, removing obstructions therefrom and widening, deepening or straightening their channels, roads, streets, alleys, and all other public uses for the benefit of the state or of any county, incorporated city, village or town or the inhabitants thereof.
3. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, steam, electric and horse railroads, reservoirs, canals, ditches, flumes, aqueducts and pipes, for public transportation supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for storing and floating logs and lumber on streams not navigable.

4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

5. Byroads, leading from highways to residences and farms.

6. Telephones, telegraph and telephone lines, and lines used in transmitting electric current for power, lighting, heating or other purposes.

7. Sewerage of any incorporated city.

8. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

9. Pipe lines for the transmission, delivery, furnishing or distribution of natural or manufactured gas for light, heat or power, or for the transportation of crude petroleum or petroleum products; also for tanks, reservoirs, storage, terminal and pumping facilities, telephone, telegraph and power lines necessarily incident to such pipe lines.

10. Snow fences or barriers for the protection of highways from drifting snow. [C.C.P. 1881, §851; R.S., §5210; am. 1903, p. 203, §1; reen. R.C. & C.L., §5210; C.S., §7404; am. 1923, ch. 98, §2, p. 122; am. 1931, ch. 39, §1, p. 74; I.C.A., §13-701; am. 1933, ch. 211, §1, p. 443; am. 1951, ch. 58, §1, p. 85.]

* * * * *

TITLE 61

PUBLIC UTILITY REGULATION

* * * * *

Chapter 4 – Reports By Public Utilities

61-405. Annual report. – Every public utility shall file an annual report with the commission, verified by the oath of an officer thereof. The verification shall be to the best of said officials knowledge, information and belief. The commission shall prescribe the form of such report and the character of the information to be contained therein, and may from time to time make such changes and such additions in regard to the form and contents thereof as it may deem proper, and on or before * * *January first* in each year shall furnish a blank form for such annual reports to every public utility. The contents of such reports and the form thereof shall conform, as nearly as may be, in the case of public utility subject to an act of congress, entitled “An act to regulate commerce,” approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, to that required by the interstate commerce commission; and the commission may also require the report to contain such additional information as is reasonably practicable for the public utility to furnish in relation to rates or regulations concerning fares, rates, agreements or contracts affecting the same, so far as such rates or regulations pertain to transportation within this state. In case it is unable to give such information, it shall give a good and sufficient reason for such

failure. When the report of such corporation is defective, or believed to be erroneous, the commission shall notify the corporation or person to amend the same within the time prescribed by the commission. The originals of the reports subscribed to and sworn to as prescribed by law, shall be filed on or before the * *fifteenth* day of *April* in each year and preserved in the office of the commission. The commission may extend the time for making and filing such report for a period not exceeding sixty (60) days.

Provided, that the commission may in its discretion, prescribe an abbreviated or modified form for such annual report, to be used by persons or corporations who operate or control any plant or system for distributing electric current but who do not generate such current, or by persons or corporations who operate on a small scale or serve a small community of persons. [1913, ch. 61, § 27, p. 248; am. 1915, ch. 101, § 1, p. 239; compiled and reen. C.L. 106:80; C.S., § 2448; I.C.A. § 59-405; am. 1953, ch. 71, § 1, p. 92.]

61-610. Right to inspect books and examine employees. — The commission, each commissioner and each officer and person employed by the commission shall have the right at any and all times to inspect the accounts, books, papers and documents of any public utility, and the commission, each commissioner and any officer of the commission or any employee authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to the business and affairs of said public utility: provided, that any person other than a commissioner or an officer of the commission demanding such inspection shall produce under the seal of the commission his

authority to make such inspection: provided further, that a written record of the testimony or statement so given under oath shall be made and filed with the commission. [1913, ch. 61, §54, p. 248; reen. C.L. 106:119; C.S., §2487; I.C.A., §59-610.]

TITLE 63

REVENUE AND TAXATION

Chapter 1

Property Subject To Taxation

Exemptions Definitions and Liens

* * * * *

63-105. Property exempt from taxation.— * * Property *shall be* * exempt from taxation * *as provided in this chapter*; provided, * * * that no deduction shall be made in assessment of shares of capital stock of any corporation or association for exemptions claimed under this section, and provided further, that the term full cash value wherever used in this act shall mean the actual assessed value of the property as to which an exemption is claimed. * * * [(See R.C., §1644; am. 1911, ch. 171, p. 565; am. 1912, ch. 8, §1, p. 21) 1913, ch. 58, §4, p. 174; am. 1915, ch. 78, p. 189; compiled and reen. C.L. 133:4-4a; C.L. 133:4f, now subd. 6; am. 1919, ch. 190, §1, p. 574; C.S., §3099; am. 1921, ch. 106, §1, p. 245; am. 1927, ch. 145, §1, p. 188; am. 1929, ch. 201, §3, p. 385; I.C.A. §61-105; am. 1935, ch. 97, §1, p. 204; am. 1943, ch. 129, §1, p. 261; am. 1943, ch. 131, §1, p. 265; am. 1945, ch. 169, §1, p. 253;

am. 1947, ch. 98, §1, p. 178; am. 1949, ch. 269, §1, p. 541; am. 1957, ch. 68, §1, p. 112; am. 1957, ch. 155, §1, p. 257; am. 1961, ch. 42, §1, p. 57.]¹

63-105A. Property exempt from taxation—Government property.—
The following property is exempt from taxation: Property belonging to the United States, except when taxation thereof is authorized by the Congress of the United States, this state, or to any county or municipal corporation or school district within this state. [I.C., §63-105A, as added by 1961, ch. 42, §2, p. 57.]

* * * * *

63-105I. Property exempt from taxation—Irrigation water and structures—Operating property of irrigation districts or canal companies.—
Water rights for the irrigation of lands are exempt from taxation. Canals, ditches, pipelines, flumes, aqueducts, reservoirs, and dams, used primarily for the irrigation of lands, are exempt from taxation to the extent irrigation water is thereby conveyed, stored or diverted; provided that if any portion of such property is used for purposes other than irrigation of lands the assessor shall determine the entire value of such property so used and assess the proportionate part of such property that is devoted to such use.

¹ Prior to the 1961 Amendment Section 63-105 read in pertinent part:

The following property is exempt from taxation . . . :

1. Property belonging to the United States, this state or any county or municipal corporation or school district within this state.

The operating property of all organizations, whether incorporated or unincorporated, heretofore organized or which shall hereafter be organized, for the operation, maintenance, or management of an irrigation project or irrigation works or system or for the purpose of furnishing water to its landowners, members or shareholders, the control of which is actually vested in those entitled to the use of the water from such irrigation works or system is appurtenant, is exempt from taxation. The term "operating property" as used in this section shall include all real and personal property owned, used, operated or occupied primarily for the maintenance and operation of such irrigation project or (or) irrigation works and system or in conducting its business of furnishing water to its landowners, members or shareholders and shall include all title and interest in such property as owner, lessee, or otherwise; provided, that if any portion of such operating property is used for commercial purposes by others than its landowners, members or shareholders the assessor shall determine the entire value of such portion of the operating property so used and assess the proportionate part of such operating property that is used for commercial purposes. [I.C., §63-1051, as added by 1961, ch. 42, §10, p. 57.]

Compiler's note. Word "or" in eleventh line of second paragraph enclosed in parentheses by compiler as superfluous.

TITLE 67

STATE GOVERNMENT AND STATE AFFAIRS

* * * * *

67-1019. Submission of annual financial statement to state auditor by all taxing and assessing units of government—Regulations.— In addition

to any other statement of financial condition required by law, the auditor of every county, and the treasurer of any other taxing unit of government or assessing unit of government, shall submit to the state auditor an annual financial report, under oath, as in this act provided. The state auditor shall formulate regulations necessary hereunder. [1969, ch. 402, §1, p. 1121.]

Compiler's note. The words "this act" refer to S.L. 1969, ch. 402, which is compiled herein as §§67-1019-67-1021.

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2 CA (9) No

3 71 2614
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6 UNITED STATES COURT OF APPEALS
7 NINTH CIRCUIT
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11 A W SCHNITGER Appellant

12 V

13 CANOGA ELECTRONICS CORP Appellee
14
15

16 APPELLANT REPLY BRIEF
17
18

19 Presented by

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22 Garden Grove Ca 92640
23 714 534 2322
24

FILED

JAN 27 1972

WM. B. LUCK, CLERK

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4 UNITED STATES COURT OF APPEALS
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8 A W SCHNITGER

9 Appellant

10 V

11 CANOGA ELECTRONICS CORP

12 Appellee
13

14 Reply to the Brief of the Defendant Appellee
15

16 REPLY ON THE FACTS

17 There is no dispute on the facts in this appeal, by
18 Appellant or Appellee. They are clear, certain and
19 undisputed. Schnitger merely seeks a declaration that
20 he may purchase Electric Card Files which have been
21 since 1911 continuously sold and used in the United
22 States irrespective of a 1964 Patent and a 1968
23 Judgement. (Appellee Brief pg 2)
24

1 Appellee in the Brief does not dispute the absolute
2 fact that the Electrical Card File herein is the
3 exact replica of the Western Electric File which
4 has been in the Public Domain for more than 50 years
5 as established herein by the unopposed affidavit of
6 a registered professional engineer.(Rec Ap Pg 34-38)
7

8 Appellant Schnitger does not herein dispute the claim
9 that Canoga is the owner of U S Patent Re 25 595, that
10 said patent is valid, that Tryon wilfully infringes
11 said patent, or that the court prohibits Tryon from
12 making and selling the Electrical Card File herein
13 for commercial use. Appellant Schnitger does seek
14 a declaration that he may purchase said Files from
15 said Tryon for commercial use.
16

17 Whether the Western Electric File of 1911 herein
18 was before the Patent Office or the Court is a fact
19 of great importance and determines the burden of proof
20 in patent actions. Since this critical fact is
21 avoided by the Appellee in the Brief it follows
22 that neither the Patent Office or the Court had the
23 benefit of the Western Electric prior art for their
24 determinations.

1 It is further undisputed that Tryon manufactures
2 and sells the Electrical Card Files herein and with
3 the order and acquiescence of the Court and the
4 Appellee Canoga as admitted in the Appellee Brief
5 where Tryon is limited by the Patent and Judgement
6 only as to Comercial sales. (Appellee Brief pg 3)
7

8 Since the Appellee does not deny it and from the
9 tenor of the Brief it is an obvious fact that
10 Appellee caused the jailing of Tryon twice before
11 and will attempt the same in the future should
12 Tryon furnish Appellant Schnitger files for
13 commercial use.
14

15 REPLY ON THE ISSUES

16 1. As to 1 of Appelles Issues it is for this
17 appellate court from the facts herein to determine
18 if Appellant Schnitger has a remedy in the Federal
19 Courts to secure his lawful right of access to items
20 which have in the Public Domain for more than 50 years.
21

22 2. Appellee raises no issue herein in Issue 2.
23 Appellant Schnitger specifically and as a right of
24 a plaintiff declines to raise any issue in the action

1 below or here of validity of any patent or the issue
2 of relitigation of the infringement of any patent by
3 any person, nor does the Appellant raise any issue
4 herein on any judgement, injunction or order of any
5 court. The only issue herein, if the Court has
6 jurisdiction under the facts herein, is does Appellant
7 Schnitger have access to a currently manufactured
8 product which has been in the Public Domain for more
9 than 50 years or is such a right not subject to
10 protection by the Federal Courts. (Appellee Brief pg 6)
11
12

13 REPLY ON THE ARGUMENT

14 I. The Appellee on page 4 of the Brief states the
15 statute that a controversial case in jurisdiction
16 may be declared for any interested party by any U S
17 Court. The jurisdiction and the existence of actual
18 controversy depend on the facts of the case and are
19 for the Court to determine in the present proceeding.
20 The facts upon which the cited prior cases of the
21 Appellee depend are all without application to the
22 facts of the case herein. It is no mere economic
23 interest to have free access to a mass produced item
24 in current manufacture for the United States to use

1 in ones own business. Appellant seeks nothing from
2 Appellant or any change in their patents or judgements.
3 Appellant seeks only right to buy a currently
4 manufactured product which has been made used and
5 sold in this jurisdiction for over 50 years. It
6 must be absolutely obvious that if Appellant did
7 use and sell the Electrical Circuit File herein
8 which is in the public domain for fifty years he
9 could not infringe any patent and neither could
10 Canoga charge Schnitger with infringement as
11 Appellee states on page 7 line 12 of the Brief.
12 The facts of the action herein are unique and
13 without precedence in the cases of this court.
14

15 II. In part II of Appellee's argument there is
16 further recitation of their patent ownership,
17 validity and infringement judgement. It is not an
18 issue here that the patent is valid and infringed.
19 It is an admitted fact herein that the Electric Card
20 File herein has been for a long time and is currently
21 being mass produced, manufactured and sold by Tryon
22 irrespective of said patents and judgements. These
23 Electric Circuit Files are in stock within this
24 jurisdiction at La Habra California for immediate

1 delivery and sale and they are the same file that
2 has been in stock and on sale in this jurisdiction
3 at least since 1953 which is ten years prior ro the
4 date of the patent. In spite of Appellee's
5 repeated suggestion of relitigation of a prior case
6 on the issue of validity and infringement, it will
7 not be donefor the simple and very practical
8 reason that the Appellant does not have the money
9 that such a course would require, nor should such
10 a course be necessary for the Court is bound by rule
11 one of the rules of civil proceeedure to secure the
12 inexpensive determination of every action in a speedy
13 fashion. Rhetoric and form must give way to substance.
14 If a product is absolutely in the public domain as
15 conclusively shown in the record herein, it is not
16 just, speedy or inexpensive to proceed as the
17 Appellee seems to indicate. The Court has a duty to
18 see that the right to things in the public domain
19 are not infringed.

1
2
3
4
5 CONCLUSION

6 Although the Appellee Canoga by its Brief and the
7 record in the action below admits without
8 reservation that the Electric Circuit File is
9 conclusively in the Public Domain and has been
10 there for at least 50 years, it unabashedly asks
11 the Court to continue this restraint of trade in
12 this product of the public domain on form alone.
13 It is clear that there is an over riding public
14 interest in any attempt to monopolize for private
15 advantage things which are public property. The
16 Court should protect the right of Appellant Schnitger
17 in his use of public property in the Electric
18 Circuit File herein.

19
20 A W Schnitger
21 Appellant

18 January 1972

1
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3
4 APENDEX TO THE REPLY BRIEF
5

6 DISCLAIMER AND RESERVATION
7

8 Appellant Plaintiff A W Schnitger hereby gives the
9 Court and the Appllee Defendant Canoga and their
10 Attorneys notice that certain facts admitted in the
11 Reply Brief herein are admitted for the limited
12 purpose of simplifying the appeal herein only.
13 Appellant A W Schnitger on information and belief
14 denies for all purposes except in the action herein
15 that Canoga owns U S Patent Re 25595, that said
16 patent is valid, that Tryon wilfully or otherwise
17 infringed said patent, or that there exists any
18 valid action, injunction, judgement, determination
19 of validity, or determination of infringement with
20 respect to said patent. Appellant has only hearsay
21 to support his belief above. The admissions herein
22 are made to simplify the issues and are all from the
23 mouth of the Appellee and the Appellant is not
24 prepared to offer any evidence on these issues.

1 Even a valid and infringed patent as found by the
2 court without benefit of a controlling piece of
3 prior art can be the instrument of restraint of
4 trade in a product of the public domain. (Reply
5 Brief pg 2 ln 17)
6

7 A W Schnitger
8 Appellant
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18 January 1972

CA 9 No

71 2614

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

A W SCHNITGER Appellant

V

Canoga Electronics Corp Appellee

PLAINTIFFS OPENING BRIEF

FILED

Presented by

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4 UNITED STATES COURT OF APPEALS
5 NINTH CIRCUIT
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8 A W SCHNITGER

No 71 - 2614

9 Appellant

Appellants Opening

10 V

Brief

11 CANOGA ELECTRONICS CORP

12 Appellee
13

14 Appeal from the Summary Judgement of Dismissal of 2 July
15 1971 U S District Court Central District of California
16 W P Gray judge.
17

18 STATEMENT OF THE CASE

19 Plaintiff and appellant A W Schnitger is prevented from
20 purchasing the Electric Card File which has been made
21 used and sold in the United States commercially since
22 1911 by the credible expressed threat of the Defendant
23 and Appellee Canoga Electronics Corporation to jail the
24 present manufacturer William Tryon.

1 The threat is really credible as the District Court on two
2 previous occasions with the connivance of Canoga jailed
3 Tryon for thirty days entirely without reason. (See Rec
4 on App pg 32 L6-25)

5
6 Tryon manufactures the Electric Card File comprising a
7 guiding element having a protrusion adjacent one end
8 provided with an aperture to align an electrical connector
9 with the circuit board track defined on the guiding
10 element for sale to others only for ultimate use of the
11 United States. By reason of the intimidation of Canoga,
12 Tryon refuses to sell the Electric Card File to Schnitger
13 for commercial use. (Rc Ap pg 1 L29 - pg 2 L6, pg28 L20 -
14 pg 29 L3, pg 31 L15 - pg32 L3)

15
16 The Electric Card File was designed by the professional
17 electrical and mechanical engineer Edward E Simmons Jr
18 to be an exact structural replica of the Western Electric
19 File which has been on continuous commercial sale to the
20 public by Simmons since 1953. (RC Ap pg 37 L15 and the
21 Affidavit of Simmons generally Rc Ap Pg 34-38)

1 The Court with the unopposed Affidavits of Schnitger
2 Tryon and Simmons before it summarily ruled in face of
3 absolute fact that Plaintiff Schnitger has no remedy
4 against the restraint of trade by Defendant Canoga in
5 a File which has been in the Public Domain for more than
6 fifty years.

7
8 ARGUMENT

9 The action in the District Court was brought under the
10 Declaratory Judgement Act 28 USC 2201 in which any
11 interested party may have the Court declare his rights
12 in the case of Patent restraint. This procedure is
13 now well established in patent cases. (Edelmann v Triple
14 CA7'37 88F2 852)(Brisk v Belanger CA1'54 209 F2 169)
15 (Dewey v Almy CA3 137 F2 68)9)(American v Dow CA6
16 161 F2 956)(Crosley v Hazeltine CA3 122 F2 925)
17 (Walker v Walker DC Cal 86 FS 657)

18
19 This a case of extreme simplicity. Defendant Canoga
20 does not dispute the facts of the Complaint which are
21 now conclusively established by the unopposed
22 affidavits of Schnitger, Tryon and Simmons (Rc Ap pg
23 28 - 38). The Western Electric File is in the Public
24 Domain and the Electric Card File (Tryon) herein is

1 identical in every respect to the Western Electric File
2 and was intentionally designed by a professional
3 engineer to be identical.
4

5 The only question for the Court is whether any patent,
6 judgement, order, injunction, privy relationship, finding
7 of res judicata, lack of dispute or any other finding or
8 order claimed by the Defendant Canoga can be allowed to
9 interfere with the free use of things in the Public Domain.
10 Nothing should bar the fundamental right to vend the
11 Electrical Card File which has been in the Public Domain
12 for more than fifty years.
13

14 Appellant Schnitger requests the Court reverse the
15 judgement in the District Court herein and order the
16 issue of injunction against the Appellee from
17 intereference with commerce by Schnitger in Electric
18 Card Files.
19

20 A W Schnitger
21 Appellant
22
23
24

7 December 1971

No. 71-2614

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. W. SCHNITGER,

Plaintiff-Appellant,

vs.

CANOGA ELECTRONICS CORP.,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE.

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FILED

JAN 6 1972

WM. B. LUCK, CLERK

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-Appellee
a

MAR 2 1972

WM. B. LUCK, CLERK

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I.

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No. 71-2614

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. W. SCHNITGER,

Plaintiff-Appellant,

vs.

CANOGA ELECTRONICS CORP.,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE.

Statement of Issues.

1. Whether there is any dispute, case or controversy between the parties to this action on which Schnitger can base an action based on the Federal Declaratory Judgment Act, 28 U.S.C. §2201.

2. Whether the principles of *res judicata* apply and serve to prohibit Schnitger from again relitigating the issues determined in prior litigation as to the validity of United States Patent Re. 25,595, and the infringement of said patent by the circuit board files produced by Tryon.

Statement of Facts.

Defendant-appellee, Canoga Industries, sued herein as Canoga Electronics Corp. and hereinafter referred to as "CANOGA", submits the following statement of facts.

Plaintiff-appellant, A. W. Schnitger, hereinafter referred to as "SCHNITGER", seeks in the instant action a declaration that he may purchase certain card guides from William Tryon, d/b/a Tryon Components Company, hereinafter referred to as "TRYON", irrespective of the determination made in an action entitled *Scanbe Manufacturing Corporation, a California corporation, v. William Tryon, d/b/a Tryon Components, et al.*, Civil Action No. 65-784 PH, in the United States District Court for the Southern District of California, Central Division, hereinafter referred to as "SCANBE". Scanbe Manufacturing Corporation is a wholly owned subsidiary of Canoga.

In *Scanbe*, the interlocutory judgment entered on January 6, 1966, decreed that Scanbe Manufacturing Corporation owned all right, title and interest in and to Letters Patent 3,017,232 and Re. 25,595, together with claims for infringement thereof. In that judgment, the Court further decreed that said patents were duly and legally issued, that Patent Re. 25,595, including all of its fifteen claims, is valid, and that Tryon had wilfully infringed the patent with actual knowledge of Scanbe Manufacturing Corporation's patent rights by making and selling printed circuit card holders and card holder assemblies which respond to the claims of said patents. On June 6, 1968, a final judgment was entered in *Scanbe*, whereby the District Court decreed that Edward E. Simmons, Jr. (hereinafter referred to as "SIMMONS") was the privy of Tryon. By said interlocutory and final judgments, Tryon was pro-

hibited from producing and commercially selling printed circuit card holders and card holder assemblies which respond to the claims of the above-mentioned patents.

In the instant action, Schnitger seeks a declaration that he may purchase from Tryon those printed circuit card holders and card holder assemblies (hereinafter sometimes referred to as "circuit board files") from Tryon, for commercial use, which in *Scanbe* were held to infringe the above-mentioned patent.

ARGUMENT.

I.

Schnitger's Statements in His Sworn Affidavit and Deposition Show That There Is No Actual Controversy Between the Parties to This Action, and That, Therefore, There Is No Basis for an Action for Declaratory Relief Under 28 U.S.C. Section 2201.

Schnitger has made clear, both in his complaint [Cl. Tr. p. 1] and in his Opening Brief (p. 5), that this action is brought under the Federal Declaratory Judgment Act, 28 U.S.C. §2201. That statute states:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

It has been made clear in countless cases that, if there is no case or controversy between the parties, no cause of action for declaratory relief under the Federal Declaratory Judgment Act can be stated. Thus, it is said in *Muller v. Olin Mathieson Chemical Corporation*, 404 F.2d 501, 504 (2d Cir. 1968):

“The existence of an actual controversy in the constitutional sense is of course necessary to sustain jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201.”

In *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240-41, 81 L.Ed. 617, 621 (1936), the Su-

preme Court of the United States defined the meaning of “controversy” as used in the Declaratory Judgment Act as follows:

“A controversy . . . must be one that is appropriate for judicial determination. . . . [citation omitted] A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . [citation omitted] The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . [citation omitted] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”

In patent cases, it has been held that a declaratory judgment action is precluded against a patent owner unless the plaintiff is in fact accused of infringement by the patent owner. In *Aralac, Inc. v. Hat Corporation of America, Inc.*, 166 F.2d 286, 295 (3d Cir. 1948), the Court said:

“Where a person is not engaged in possible infringing conduct and with no intention of doing so, he lacks an interest in a controversy to support an action for declaratory judgment relief to test the validity of a patent. . . .

. . . .

“Plaintiff argues that assuming the absence of infringement, direct or contributory, since plaintiff’s loss of business resulted from defendant’s course of conduct, a justiciable controversy was present.

“An economic interest is not enough to create justiciability. . . . [citation omitted] Plaintiff must have a protectible interest . . . [citation omitted] and an adequate interest. [Emphasis added.]”

It is clear, both from Schnitger's affidavit and his testimony in his deposition, that he has no controversy with Canoga, and that Canoga has made no claim that its patent Re. 25,595 is being infringed by Schnitger.

Thus, in his affidavit Schnitger states [Cl. Tr. p. 29]:

“Schnitger has no knowledge of the contents or legal effect of U S Patent RE 25 595 or of the contents or legal effect of the action Scanbe v Tryon No 65 784 HP.

“Schnitger has no dispute with Canoga in regard to any aspect of Canoga patents, or disputes between Canoga and Tryon regarding circuit board files, or the merits of real or purported judgments, injunctions and court orders claimed by Canoga.

“Schnitger has never and does not now seek to have the Court vacate or extinguish any injunction, judgment or order procured by Canoga in this or any other court.

“Schnitger has never and does not now dispute the validity of any patent or claim or any order, injunction, and judgment owned by or in favor of Canoga.

“Schnitger does not seek any damage or the taking of any right from Canoga by the action herein.”

Similarly, in his deposition taken on February 12, 1971, portions of which are quoted in the affidavit of Alfred E. Augustini [Cl. Tr. pp. 22-23], Schnitger makes clear that he has had no discussions whatsoever

with anyone at Canoga regarding any dispute over his right to buy Tryon card files, and that his only dispute is with Tryon and not with Canoga.

It is obvious, therefore, that Schnitger seeks to protect only that certain speculative economic interest related to his possible purchase of circuit card guides from Tryon. As is made clear in *Aralac*, however, such an economic interest is insufficient to ground an action for declaratory relief under 28 U.S.C. §2201. Not only is there no sufficient economic interest involved, but there is in fact no controversy whatsoever because there has been no charge of infringement by Canoga against Schnitger. It is thus clear that there is no case or controversy of any type, and certainly not one sufficient to bring an action under the Declaratory Judgment Act, 28 U.S.C. §2201, and that the complaint in this action was properly dismissed by the Trial Court.

II.

Assuming, Arguendo, That an Actual Controversy Is Presented, Schnitger Is Barred by the Principles of Res Judicata From Relitigating Issues Already Determined in Prior Litigation to Which He Is a Privy.

The interlocutory judgment in *Scanbe*, as mentioned above, decreed that Canoga's patent Re. 25,595 was duly and legally issued, that said patent, including all of its fifteen claims, is valid, and that Tryon had wilfully infringed the patent with actual knowledge of Scanbe's patent rights by making and selling circuit card holders and card holder assemblies which respond to the claims of said patent. By means of the injunction and said interlocutory judgment in *Scanbe*, Tryon is

prohibited from selling to anyone circuit card holders, files, or card holder assemblies for commercial use which respond to the claims of patent Re. 25,595.

Although Schnitger was not a party to the judgment in *Scanbe*, it is clear that the manufacturer or customer relationship satisfies the requirement of privity in order to make applicable the principles of *res judicata*. As has been stated in *Minnesota Mining and Manufacturing Co. v. Superior Insulating Tape Co.*, 284 F.2d 478, 485 (8th Cir. 1960):

“*Kessler v. Eldred*, *supra*, [206 U.S. 285, 27 S. Ct. 611, 51 L.Ed. 1065 (1906)] holds that the final determination of infringement issues between the patent holder and the manufacturer alleged to have infringed, determines the same issues as to the manufacturer’s customer.”

The same rule of law has been applied to patent litigation matters. Thus, in *Ransburg Electro-Coating Corp. v. Williams*, 246 F.Supp. 626 (W.D. Ark. 1965), the action involved the same patent and claims which had been previously litigated between the plaintiff patent holder and the manufacturer of the infringing devices in a prior action. In the prior action, the Court had held that all of the patents were valid and that the claims were infringed. Thereafter, suit was brought by the plaintiff patent holder against the purchasers of the infringing device. The Court in *Ransburg* said (at 632):

“The accused device in the instant action was manufactured and sold by Ionic to the defendants. The defendants are privy to the prior action and the issues decided in it by virtue of their purchase from Ionic and Ionic’s participation in the prior suit with the plaintiff Ransburg.

....

“In determining whether the judgment in the *Ionic* case, *supra*, is binding upon the defendants, it must be borne in mind that *Ionic*, the manufacturer of the accused device, was a party and, in fact, conducted the defense, and also that the defendants in the instant case purchased the device from *Ionic*, and the judgment in the *Ionic* case is binding upon the defendants in the instant case and conclusive of the issue *now* before the Court.”

The same situation presented in *Ransburg* is presented in the instant case. In the prior *Scanbe* action, judgment was entered against Tryon in which it was held that patent Re. 25,595 is valid, and that the claims were infringed by Tryon. Schnitger, as a purchaser or proposed purchaser of the file held to infringe said patent, is in privity with Tryon, and the judgment rendered in Tryon is applicable, therefore, to any claims made by Schnitger regarding said same infringement.

It is clear, therefore, that the *Scanbe* judgment precludes relitigation of the same issues in the instant action by parties in privity with Tryon, and that, therefore, Schnitger is barred from bringing the instant action.

III. Conclusion.

It is respectfully submitted, therefore, that the dismissal of the action by the Trial Court was entirely proper because no cause of action for declaratory relief has been stated by Schnitger because there is no actual controversy existing between the parties to this action. Assuming, *arguendo*, however, that a case or controversy within the definition of 28 U.S.C. §2201 is presented, Schnitger is barred by the principles of *res*

judicata from relitigating the same issues that were decided in *Scanbe* and, therefore, the action was properly dismissed by the Trial Court.

It is respectfully submitted, therefore, that the dismissal of the instant action, and the judgment entered in this action by the United States District Court, should be confirmed.

Dated: December 31, 1971.

Respectfully submitted,

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as Canoga Electronics Corp.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

See Vol. 366

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
ALBERT BERNARD KORB,)
)
Defendant-Appellant.)

No. 26,099

FILED

MAR 13 1972

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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RECEIVED
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WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
ALBERT BERNARD KORB,)
)
Defendant-Appellant.)
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
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 Plaintiff-Appellee,)
)
 v.)
)
ALBERT BERNARD KORB,)
)
 Defendant-Appellant.)

)

APPELLEE'S BRIEF

I

QUESTIONS PRESENTED

Appellant's questions raised on appeal are paraphrased
as follows:

- A. Whether there was probable cause to arrest
appellant and search the vehicle in which he
was riding.
- B. Whether the search can be sustained as a border
search.
- C. Whether the search can be sustained under Immi-
gration's statutory authority to search for
aliens.

D. Whether the circumstantial evidence was sufficient to prove illegal importation of the marihuana and appellant's knowledge thereof without application of the presumption proscribed by Leary.

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in counts one and two of a three-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of 18 U.S.C. §§543, 3231 and 21 U.S.C. §176(a).

Jurisdiction of this court rests pursuant to 28 U.S.C. §§1291 and 1294.

B. PROCEEDINGS AND DISPOSITION IN THE LOWER COURT

Appellant and David Bernard Lansing were charged in all three counts of the indictment.

Count one charged appellant and Lansing, in effect, with smuggling 110 pounds of marihuana. Count two charged both, in effect, with concealing and facilitating the transportation and concealment of 110 pounds of marihuana. Count

three charged both, in substance, with smuggling two pistols [C.T. 1-3].

Motions to suppress evidence and to sever the two defendants for trial were denied by the Honorable Edward J. Schwartz, United States District Judge, after a full hearing [C.T. 25-27]. Non-jury trial of appellant and Lansing commenced before the Honorable E. Avery Crary, United States District Judge on July 30, 1969. The motion to suppress evidence was renewed and heard simultaneously with the trial testimony [C.T. 29-31]. On July 31, 1969, Judge Crary found appellant and Lansing guilty of counts one and two and not guilty of count three [C.T. 31].

On September 29, 1969, appellant was sentenced by Judge Schwartz to five years on each of counts one and two to run concurrently [C.T. 46]. On the same date, September 29, 1969, appellant filed a notice of appeal [C.T. 47].

C. STATEMENT OF THE FACTS

A motion to suppress evidence and to sever the appellant and his codefendant Lansing, at trial was heard by the Honorable Edward J. Schwartz on July 11 and July 23, 1969, and denied as to both [C.T. 25-27]. Judge Schwartz filed Findings of Fact and Conclusions of Law regarding his denial of the motion to suppress [C.T. 37-39]. Non-jury trial was heard before the Honorable E. Avery Crary on July 30 and July 31,

1969 [C.T. 30-34; R.T. 6, 277]. Appellant renewed his motion to suppress the evidence. As pointed out on page 3 of appellant's brief, the evidence elicited at the trial regarding the motion to suppress was substantially the same as the evidence produced at the previous motion to suppress. For purposes of brevity, the facts of the motion to suppress are not repeated herein.

The facts showed that appellant and Lansing first came to the attention of Customs officers when they entered the United States at San Ysidro from Tijuana in a Volkswagen at 12:05 p.m. on January 10, 1969 [R.T. 101, 230]. Marihuana seeds were observed on the front and rear floor of the vehicle. A large empty footlocker-type trunk was on the rear seat of the vehicle. The two occupants of the vehicle had approximately \$1,000 on their person. The vehicle had been rented [R.T. 232-234]. Because of this, the inspector strongly urged that Customs Agent Ahern "should follow this case through." Customs Agent Ahern testified that the port inspectors told him of these facts and in addition told him that the occupants were from back east [R.T. 176]. Agent Ahern participated in a surveillance of the vehicle and its two occupants when it proceeded to Oscars Drive-In near the port of entry, then to downtown San Diego, where several stops were made, and then the vehicle returned to Tijuana [R.T. 180-181, 42-44].

It was decided that Agents Burnett and Maldonado would continue the surveillance in Mexico [R.T. 179]. Agent Ahern informed Customs Agent Prentiss White at Tecate, California, of all these facts by telephone [R.T. 176-177]. Agent Maldonado testified that he followed the vehicle and its occupants in Mexico. He observed them stop at a drive-in on the Tecate highway where they changed drivers and the vehicle proceeded on the Mexican side past Tecate about 30 miles to a small settlement called Larumorasa. The vehicle and its occupants were then seen to make a U-turn and travel west towards Tecate for five to six miles at which point it made another U-turn and proceeded east again on the same highway. Upon arriving at the outskirts of Larumorasa, again, another U-turn was made and they proceeded back in a westerly direction. Because of mechanical difficulty of one of the surveillance vehicles, the Volkswagen was lost. This was about 6:00 p.m. the same day [R.T. 95]. Agents Maldonado and Burnett proceeded to the port of entry at Tecate where they informed Agents White and Crenshaw of the results of their surveillance as well as the information they had obtained from Agent Ahern and the inspectors at the port of entry at San Ysidro.

Richard Colburn, Senior Patrol Inspector, Immigration, testified as a Government witness. He learned from Customs

agents at Tecate that two male subjects, both from the east, driving a rented Volkswagen were in possession of a large amount of money, and the Volkswagen had a footlocker in it when it came through the port of entry at San Ysidro and marihuana seeds were on the floorboard [R.T. 37-38, 106]. He also was told that the vehicle had been followed into the Tecate area and east of Tecate, about 25 or 30 miles [R.T. 37-38, 106]. He was provided a description of the vehicle and the license number [R.T. 107]. He knew the vehicle had been in Mexico, directly south of Jacumba, California, earlier that day [R.T. 223].

About 11:30 p.m. on January 10, 1969, Mr. Colburn observed the vehicle enter the United States, proceed north to the Tecate junction and then proceed east on Highway 94 to an area just west of Jacumba where it disappeared from sight proceeding south about 200 to 300 yards north of the Mexican border [R.T. 109-112, 129, 135]. This area is notorious for smuggling of aliens and contraband [R.T. 129]. This was about 1:00 a.m. [R.T. 150]. Approximately one and one-half hours later, the vehicle returned and was stopped by Mr. Colburn and his fellow officers. They checked the footlocker and it was empty. Upon opening the luggage compartment two pistols and a holster were observed as well as a military type duffel bag. The bag was opened and contained packages that were later

determined to contain marihuana [R.T. 112-115]. He stopped the vehicle for a dual purpose, to check for aliens and for contraband [R.T. 132]. Inspector Colburn testified that the luggage compartment of this Volkswagen was as large as compartments in which he has found aliens concealed [R.T. 123]. The border fence in this area is a five-strand barbed-wire fence about five feet high. Vehicles can cross the border into Mexico at this point [R.T. 139]. Mr. Colburn has seen evidence of vehicles crossing the border in this area by lowering the strands of the fence and driving the vehicle over [R.T. 143]. No business of any kind was open in Jacumba and no other vehicles were moving in the area [R.T. 149].

Inspector Colburn is also designated as a Customs inspector [R.T. 134]. He has worked 11 years along the Mexican border. Most of the marihuana is carried around to pickup points rather than being brought through ports of entry. Duffel bags are often used for this [R.T. 154-155]. The marihuana in this case, in the opinion of Inspector Colburn, came from Mexico. This opinion was based upon 20 to 30 marihuana cases he has been involved in and he has never seen similarly packaged marihuana that did not come from Mexico [R.T. 188-190].

III

ARGUMENT

A. THERE WAS PROBABLE CAUSE TO ARREST APPELLANT AND SEARCH THE VEHICLE

The evidence, as previously outlined, shows that prior to the search appellant and Lansing, his companion, were from the East Coast. They were in a rented automobile and they had recently entered the United States from Tijuana, Mexico, in this same automobile. At the time of this entry, the automobile contained an empty footlocker and marihuana seeds and they had over \$1,000 on their person. They traveled in the San Diego area, making several stops and appeared to make phone calls before returning to Mexico where they traveled to and beyond Tecate, B.C., Mexico, where they made several U-turns and were last seen driving towards Tecate. They were not found in Tecate; however, later that same evening they entered the United States at Tecate in the same vehicle still containing the empty footlocker. Further, they proceeded late at night to an isolated area west of Jacumba, California, and disappeared only about 300 yards from the border at a point known to be a smuggling area of aliens and marihuana, from which they returned after being in this area about one and one-half hours [R.T. 42-44, 95, 101-112, 129, 150, 176, 180-181, 223, 230, 232-234].

This court has noted that a rental vehicle is espe-

cially attractive to smugglers. United States v. Sherman, 430 F.2d 1402, 1406 (9th Cir. 1970).

That the area where appellant disappeared was known as an area frequently used by smugglers of aliens and contraband is a circumstance to be considered in upholding a finding of probable cause. United States v. Sherman, supra at 1404-1406. This case further points out at 1405 that "each significantly suspicious circumstance by itself might not suffice for probable cause. Combined, they are conclusive." The court goes on to note that the time of night and the isolated area are further factors to consider. Appellant's situation is even stronger on its facts that those in Sherman where this court upheld the District Court's finding of probable cause.

Appellant relying on United States v. Jackson, 423 F.2d 506 (9th Cir. 1970), contends that evasive or suspicious conduct must be shown. In addition to circuitous travel and other suspicious activities similar to appellant's case, Jackson and his companion attempted to escape from the officers. However, unlike appellant's situation, the facts in Jackson did not show the presence of a footlocker, marihuana seeds, a large sum of money in their possession and travel in Mexico adjacent and just prior to their midnight visit to the border area in the United States. If Jackson requires suspicious conduct, it is certainly present from the related facts.

B. THE SEARCH OF THE VEHICLE IN QUESTION
CAN BE SUSTAINED AS A BORDER SEARCH

The facts show that appellant and Lansing traveled south to the west of Jacumba, California, from a point only 300 yards from the Mexican border after having been in Mexico immediately south and adjacent to this point. These facts will sustain a border search without the necessity of a showing of probable cause. United States v. Weil and Looper, 432 F.2d 1320 (9th Cir. 1970), cert. denied, 401 U.S. 497 (1971); United States v. Markham, 440 F.2d 1119 (9th Cir. 1971); United States v. Salazar-Gaeta, 447 F.2d 468 (9th Cir. 1971).

Appellant appears to contend that the prior searches precluded a subsequent search of the vehicle occupied by appellant. It is noted that the vehicles in the Weil and Looper, supra and Salazar-Gaeta, supra, were both searched upon entering the United States. The subsequent search in each was found to be a border search. The facts of Salazar-Gaeta are closely in point to appellant's situation. That vehicle crossed the border, was searched and no contraband found. After being driven around the streets of Calexico aimlessly, it then proceeded west 10 to 20 miles to Anza bridge where it departed south on a dirt road one or two miles to the border. The road did not cross the border, but a person may walk across. Ten minutes later the vehicle returned from near the border,

now riding lower in the rear. The vehicle returned to Calexico where the driver departed to Mexico. Salazar-Gaeta then entered the vehicle and drove north when he was arrested and 330 pounds of marihuana was found in the vehicle. The court, in relying on the border search principles said, "Under the circumstances here present, the search in the instant case was lawful, even though the search at the initial crossing of the car revealed nothing." Border patrol agents are designated as Customs officers [R.T. 134]. They, therefore, did not need probable cause.

C. THE SEARCH CAN BE SUSTAINED UNDER IMMIGRATION'S
STATUTORY AUTHORITY TO SEARCH FOR ALIENS

Immigration officers are empowered to search vehicles for aliens within 100 air miles of any external boundary.

8 U.S.C. § 1357(a)(3); 8 C.F.R. §287.1(a)(2).

The statute and regulations are not unconstitutional.

No probable cause is necessary. Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); Duprez v. United States, 435 F.2d 1276, 1278 (9th Cir. 1970); United States v. Elder, 425 F.2d 1002, 1004 (9th Cir. 1970); Buelna-Mendoza v. United States, 435 F.2d 1386, 1388 (9th Cir. 1971); United States v. Avery, 428 F.2d 1159, 1164 (9th Cir. 1970); United States v. Miranda, 426 F.2d 283, 284 (9th Cir. 1970); Foerster v. United

States, 71-2620 (9th Cir. February 15, 1972).

United States v. Elder, supra, involves, as did appellant's case, looking in the luggage compartment of a Volkswagen for aliens.

While Agent Colburn was looking in the luggage compartment of the vehicle that was occupied by appellant, he observed the duffel bags and two guns that apparently were not there previously [R.T. 112-115]. If Agent Colburn lacked probable cause before this, he surely now had probable cause to search for the contraband. Since Agent Colburn knew that appellant and his companion had been directly south of the border only a few hours before and reasonably believed that they had approached the adjacent area just north of the border, the duffel bags and the guns would more than give him probable cause to search for the merchandise he reasonably believed had been illegally brought into the United States from Mexico by appellant.

See the reasoning in United States v. Blackstock, 451 F.2d 908 (9th Cir. 1972).

- D. THERE WAS SUFFICIENT EVIDENCE TO PROVE THAT THE MARIHUANA WAS SMUGGLED INTO THE UNITED STATES AND APPELLANT'S KNOWLEDGE THEREOF WITHOUT THE PRESUMPTION PROSCRIBED BY LEARY
-

The presumption found infirm in Leary v. United States, 395 U.S. 6 (1969), was not included in the jury instructions.

illegal importation of marihuana and knowledge thereof may be proved by circumstantial evidence. Buelna-Mendoza v. United States, supra at 1388; United States v. Oswald, 441 F.2d 44, 47 (9th Cir. 1971); Duprez v. United States, supra at 1277-1278; Gibbs v. United States, 435 F.2d 621, 624 (9th Cir. 1970), cert. denied, 401 U.S. 944; United States v. Sherman, supra; United States v. Elder, supra; United States v. Newton, 442 F.2d 622 (9th Cir. 1971).

When, as in appellant's case, the shape and size of the packages is typically Mexican, it is a factor from which to infer illegal importation and knowledge thereof. Duprez v. United States, supra; United States v. Sherman, supra at 1406; United States v. Elder, supra at 1004; Buelna-Mendoza v. United States, supra at 1328; United States v. Newton, supra.

The duffel bags also tend to show knowledge of illegal importation. United States v. Elder, supra at 1004.

On the facts of appellant's case the evidence was sufficient for the jury to find that appellant and his companion knowingly smuggled the marihuana, thus, eliminating the issue as to whether they knew the marihuana had been imported contrary to law.

IV


CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction be affirmed.

Respectfully submitted,

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WM. B. LUCK, CLERK

APPELLANT'S REPLY BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
ALBERT BERNARD KORB,)
Defendant-Appellant.)
_____)

No. 22,222

APPELLANT'S REPLY BRIEF

APPEAL FROM
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APPELLANT'S REPLY BRIEF

In this reply brief we shall reply to appellee's brief (referred to herein by the initials "A.B.") in the order that statements and arguments made therein appear, using the corresponding headings and letters used.

II

STATEMENT OF THE CASE

C. STATEMENT OF FACTS

Appellee in its Statement of Facts has patently omitted several material facts. It made no mention of the fact that when the Volkswagon, (referred to as V.W.) rented by defendants, first crossed the border from Mexico into the United States, a few seeds were observed on the floor, and the car was searched but no contraband was found. The presence of marijuana seeds thereafter could not serve as probable cause for any later or further search of the car. When the car went back into Mexico, at San Ysidro, it was

stopped by the San Diego Police and searched again. When it returned to the United States through the port of entry at Tecote, it was searched a third time. Contraband was not found in any one of these three searches.

Appellee omitted also to mention that although surveillance was made of the car for several hours while it was on the Tecote Highway, no illegal activity was observed by the surveilling agents.

III

ARGUMENT

A. There was no probable cause to arrest appellant to search the vehicle.

Appellee referred to the empty footlocker in the auto, and the observation of marijuana seeds on the floor by the federal officers when they searched the car as it came first into the United States at the Port of entry, referred to herein as "p.o.e.". Appellee apparently uses this fact to bolster its claim of probable cause. However, since no contraband was found in the car at the time and the footlocker was empty, the presence of any seeds could no longer serve as probable cause for a search of the car some 12 hours later, especially since the car was searched by San Diego Police when it reentered Mexico, shortly thereafter and again when it reentered the United States about 11:30 p.m. of the same day. In none of the three searches was any contraband found, so the presence of marijuana seeds lost its value as a factor in showing probable cause.

Appellee cited (A.B. 9) the case of United

States v. Sherman, 430 F. 2d 1402, in support of its statement that a rental vehicle is especially attractive to smugglers. That case is clearly distinguishable from the instant case. In Sherman, there were several circumstances justifying a finding of probable cause in this case. In Sherman, the defendants were of the "hippie" type; here there was no evidence of such characteristics. In Sherman, there was no evidence that the defendants came from a distant part of the country necessitating rental of a car; here the two boys were from the East, and obviously unless they drove from the East, they would be without automobile transportation and of necessity they would have to rent a car to get around. In Sherman, the officers questioned the defendants and the replies given were ridiculous and conflicting; here the defendants were not interrogated but search of their car was made immediately without any questioning by the officers of the occupants. Here also officers stopped the car not for the purpose of investigation and questioning, but admittedly for the purpose of making a search. When the search of the interior of the car was made without finding any contraband, and when the footlocker which was claimed to be one of the suspicious circumstances was found to be empty, the arresting officers without any questioning proceeded to search the trunk.

In Sherman, the facts and circumstances establishing probable cause were much stronger than in this case, con-

trary to appellee's assertion otherwise. In addition to the foregoing circumstances, there were in Sherman the following facts: (1) the officer actually saw hippie type appellants take the car to a smuggling area where they had been previously observed; (2) when the car returned officers observed it was visibly lower in the rear, indicating that something had been loaded in the trunk.

Nothing similar to the above was seen or noticed in the instant case. When the V.W. disappeared the surveilling officer did not see where it went. To go to the alleged area where the officer stated cars crossed the border, the V.W. had to travel on a dirt road and cross sandy soil, yet the officer did not observe any dirt, mud, sand or gravel on the wheels or body of the car. Thus all of the suspicious circumstances giving rise to probable cause in Sherman were lacking in this case.

Appellee attempted (A.B. 9) to distinguish this case from our cited case of United States v. Jackson, 423 F. 2d 506 (9th Cir.), but we submit Jackson is entirely apposite. Appellee attempted to bolster its contention of probable cause and distinguish Jackson from this case by referring to the marijuana seeds, the footlocker and the large amount of money (about \$1,000.00) in the possession of the defendants. We have pointed out above that in each of the first three searches no contraband was found, and then the presence of marijuana seeds lost their probable cause value when the search revealed no contraband. The footlocker was found empty not only on the first three searches, but also

when the last search was made just prior to the search of the trunk.

The presence of money on the person of the defendants was not a suspicious circumstance, especially since there were no questions asked about it. Many people go to Mexico to gamble, or to bet on horse and dog races, or even to buy Mexican merchandise, such as perfume, etc. It is quite customary for tourists in Mexico to carry substantial amounts of cash with them, since they would not always be able to make use of credit cards or they might not have credit cards. There was no evidence in this case that either defendant had a credit card, and hence the carrying of cash was not significant. Furthermore, the defendants still had apparently the same amount of cash when they were arrested as when they were first searched at San Ysidro. Thus, there was no indication that they used any of it to buy marijuana, and the unfounded suspicion of the officers that the cash was to be used for purchase of marijuana falls to the ground.

B. The search of the vehicle in question cannot be sustained as a border search.

We have discussed this point in our opening brief (O.B. pp 3-36) and in the interest of brevity we shall not reiterate our argument.

Appellee cited United States v. Weil and Looper, 432 F. 2d 1320 (9th cir); United States v. Markham, 440 F. 2d 1119 (9th cir); and United States v. Salazar-Gaeta, 447 F. 2d 468 (9th cir) in support of its contention that the mere presence of the car at a point 300 yards from the border in

the Jacumba area justified the search as a border search without probable cause. However, in Weil, as we pointed out in our opening brief pp. 30-31, this Court expressly related circumstances showing probable cause to bolster its opinion, stating on page 1323:

"For example, in cases in which we have upheld a search as a border search, we have emphasized that under the facts it was reasonably clear, by reason of continuous surveillance, that whatever was in the car when it was searched was also in it when it crossed the border."

Markham is distinguishable because there were other circumstances justifying the Search. The car under surveillance, occupied only by the driver, was seen heading toward the border on 9th Street in Douglas, Arizona. Officers took a place where they could surveille the open area between 9th and the border, and they did not see the car leave 9th and drive to the border. However, they received a radio call from other officers stationed near the dirt road that the car "was on its way out, toward Pan American Avenue and that it now had several persons in it." The officers then drove to Pan American and 9th and intercepted the car. It now had six occupants and appeared even more heavily laden than the number of its occupants alone would indicate. When the officers stopped it to check the driver's license, they saw a large burlap sack in plain view on the back seat. Upon opening it they discovered marijuana. A further search disclosed marijuana in the interior of the car and in the trunk. The Court referred

to the above circumstances to establish probable cause especially because of the possibility of aliens consisting of the five additional occupants of the car. Although the Court held probable cause was not necessary to justify the search, it nevertheless in part relied upon other circumstances indicating probable cause in order to support its opinion.

In Salazar, the Court relied on Markham to support its opinion.

C. The search cannot be sustained herein under Immigration's Statutory Authority to search for aliens.

Appellee cites certain cases purporting to hold that immigration officials are empowered to search vehicles within 100 miles of the border without probable cause. These cases are distinguishable and the trend of decisions is to require some evidence of probable cause to search vehicles; i.e. the offense has been committed before the search is made.

In appellee's cited case (A.B. 11) of Fernandez v. United States, 321 F. 2d 283 (9th Cir.), 8 U.S.C. Section 1357(a) was stated as recognition of the right of the United States to protect its boundaries against the entry of illegal aliens. In Fernandez, the officers upon stopping the car learned that appellant was an illegal alien. They thus could order the car to the side of the road for further questioning. The Court then questioned whether the search of the auto was based upon probable cause, and because the officer detected the odor of marijuana, the search was upheld on that ground.

In the cited case of Fumigalli v. United States, 429 F. 2d 1011 (9th Cir.), the Court after citing a number of cases purporting to be border searches, stated on page 1013: "What all of these cases makes clear is that probable cause is not required for an immigration search within approved limits but is generally required to sustain the legality of a search for contraband in a person's automobile conducted away from the international borders. Valenzuela-Garcia v. United States, 425 F. 2d 1170 (C.A. 9-1970)." (Emphasis by Court)

The Court held the probable cause to search the duffel bag in the trunk was present because the officer smelled marijuana and saw a brick protruding from the duffel bag. The Court distinguished its earlier decision of Cervantes v. United States, 263 F. 2d 800 (C.A. 9-1959) wherein the Border Patrol received an "alert from an agent in Tijuana that Cervantes might be carrying marijuana, and stopped the defendant on a public highway." His conviction was reversed on the ground of lack of probable cause.

In Valenzuela, supra, the defendant crossed the border, displayed his immigration papers, and opened his trunk for inspection. He was not detained at that point. Later while driving North on Highway 111, he was stopped again by an Immigration Inspector, and produced his alien registration card. Noting that the defendant appeared nervous, the inspector ordered him to open the trunk for inspection. The trunk floor was dusty but the interior side panels "were clean or had been moved." The inspector moved the partition of

the panel and felt inside the gap. He found packages of marijuana. The conviction was reversed for lack of probable cause, because no alien could be secreted in the space where the marijuana was found. (Citing Roa-Rodriguez v. United States, 410 F. 2d 1206 (10th Cir.).

In the cited cases of Dupres v. United States, 435 F. 2d 1276, the Court justified the search of a camper truck because of existence of probable cause.

In Buelna-Mendoza v. United States, 435 F. 2d 1386, the customs agents had information from an informant that a red chevrolet was carrying a load of marijuana. The informant gave a description of the car and the circuitous route it would travel to avoid contact with immigration inspector stations. The search for contraband was justified on the ground of probable cause.

In United States v. Avey (erroneously spelled in appellee's brief as Avery) 423 F. 2d 1159, the car driven by appellant was a station wagon of a type often used to smuggle aliens. When the immigration inspector shined his light into the car at a check point, he observed in plain sight several packages wrapped in red cellophane protruding from under a canvas tarp. He radioed for a customs agent and when a cellophane wrapped package was opened, the contents were determined to be marijuana. The Court held that the customs agents had probable cause to search the vehicle because the marijuana was in plain sight. The Court stated a search could be made for aliens without probable cause under 8 U.S.C. 1357, but implied that a search for contraband required probable cause.

In Miranda v. United States, 426 F. 2d 283, the

officer who stopped the car was an officer of the Immigration and Naturalization Service, not as in this case a customs agent looking for contraband. The Court held that the Immigration officer looking for aliens could open the hood to look for aliens, and that he had found them there in the past. When the hood was raised he detected marijuana.

In United States v. Foerster, (71-2620 9th Cir. Feb. 15, 1972), the car of defendant was apparently stopped by Immigration officers to search for aliens, and marijuana was observed during the search for aliens.

The cases cited by appellee respecting border searches without the necessity of showing probable cause are distinguishable from the instant case in that vehicles were searched by Immigration officials for the express purpose of ascertaining whether there were aliens in the vehicles. The Immigration officials were not searching for contraband, as that was not part of their duties. If, in such searches, contraband was discovered, they were not required to close their eyes. However, the searches were limited to places where aliens could be concealed, and not in places too small for that purpose.

In the instant case the officers were not Immigration officials looking for concealed aliens. They were Customs Agents expressly looking for contraband, not for aliens. Hence, the exception dispensing with probable cause in border searches for aliens was inapplicable. As the officers herein testified, they did not in the least suspect or believe

that appellant was engaged in the smuggling of aliens. On the contrary they suspected, and this was only a mere suspicion insufficient to establish probable cause, only that appellant was smuggling contraband. Under search circumstances a search must be based on reasonable or probable cause and not on 8 U.S.C. 1357(a)(3), and 8 C.F.R. 287.1(a)(2), which pertain only for searches for aliens.

This Court recognized the distinction in effect in its decisions in Fumigalli and Valenzuela Garcia, *supra*, and also in the case of Contreras v. United States, 291 F. 2d 63 (9th Cir).

We feel that the dissenting opinion of Judge Browning in the case of United States v. Condrado Almeida-Sanchez No. 26514, (September 24, 1971), is applicable to this case. His opinion rests upon the case of Carroll v. United States, 267 U.S. 132, 153-154, and other cases cited by us in our opening brief (O.B. 27-35). Although Judge Browning pointed out that the Ninth Circuit Court alone, among the the Courts of Appeals with possible exception of the Tenth Circuit, has expressly refused to impose the probable cause restriction upon searches for illegally entered aliens, nevertheless, even this Court, as we indicated above and in our opening brief, bolstered its opinions setting forth therein circumstances actually showing probable cause.

We contend, as Judge Browning succinctly stated, that the authority of government agents on border searches must be exercised in accordance with constitutional limitations of the Fourth Amendment.

We also agree with him that this Court should await the decision of the Supreme Court in the case of United States v. Johnson, (400 U.S. 990) in which certiorari was granted.

We further contend as Judge Browning also pointed out that this Court has recognized that there is a distinction between searches for smuggled aliens and smuggled merchandise. In the latter instance there must be probable cause, and the search cannot be upheld as a "border search" where probable cause is lacking.

We submit that the testimony of the officer in the instant case clearly establishes that the stop of the defendant's vehicle and the search thereof was not made for the search of aliens under U.S.C. 1357 or under 8 C.F.R. 287.1, but solely to look for contraband. In such event there must be probable cause for the search and the search must be made under the constitutional limitations of the Fourth Amendment. We have pointed out above and in our opening brief that there was in this case insufficient probable cause for the search of the small trunk of the V.W. used by the defendant.

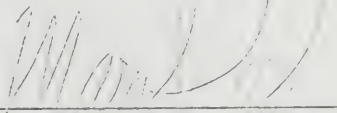
D. There was insufficient evidence to prove that marijuana was smuggled into the United States, and that defendant had knowledge thereof without the use of the presumption proscribed by LEARY.

We have discussed this issue in our opening brief (O.B. 37-38) and we shall not discuss it further herein, but we reiterate our contention that defendant is entitled to a reversal of his conviction under the Leary rule.

CONCLUSION

In conclusion we respectfully assert that the search of the trunk was not properly a "border search"; that such search required proof of probable cause under the limitations of the Fourth Amendment; that there was insufficient probable cause to justify the search of the V.W. trunk; that such search was in violation of defendant's constitutional rights under the Fourth Amendment; that there was insufficient proof of knowledge on the part of defendant that the marijuana had been smuggled into the country or that defendant Korb and his co-defendant had been guilty of the smuggling; that the evidence should have been suppressed; and that the conviction of defendant should be reversed.

Respectfully submitted,



MARVIN S. CHEN
Attorney for Appellant
Albert Bernard Korb

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF MARIN) ss.

I am a citizen of the United States and a resident of the county aforesaid. I am over the age of eighteen years and am a party to the within entitled action. My business address is 1330 Lincoln Avenue, San Rafael, California 94901.

On April 13, 1972 I served the within
Appellant's Reply Brief

in the said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Rafael, California addressed as follows:

Harry D. Steward
United States Attorney
For the Southern District of California
301 United States Courthouse
San Diego, California 92101

25 copies to: United States Court of Appeals
For the Ninth Circuit
Seventh and Mission Streets
San Francisco, California 94101

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 13, 1972 at San Rafael, California.

John D. Bailey
Declarant Lisa Loney

NO. 71-2607

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. CARRION,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

FILED

FEB 16 1972

WM. B. LUCK, CLERK

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. CARRION,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

APPELLEE'S BRIEF

I

ISSUE PRESENTED

A. Did the Court below abuse its discretion in
revoking defendant's probation?

II

STATEMENT OF THE CASE

A. JURISDICTION

Appellant, Michael A. Carrion^{1/} is appealing to this
Court from the Court below for revoking his probation and

^{1/} Hereinafter Michael A. Carrion is referred to as
"defendant" and appellee United States of America as
the "Government".

imposing sentence upon him on August 13, 1971.

Jurisdiction of the Court below was founded upon Title 18, United States Code, §3231.

Defendant filed timely notice of appeal and this Court has jurisdiction pursuant to Title 28, United States Code, §1291.

B. STATEMENT OF FACTS

On March 4, 1969 defendant was charged by Information for Illegal Acquisition of Marihuana in violation of Title 26 U.S.C. §4744(a), and for Bail Jumping in violation of Title 18 U.S.C. §3150 (C.T. 2-3).^{2/} Defendant pleaded guilty to both of these counts on March 4, 1969 (C.T. 5). On March 31, 1969 defendant was sentenced as follows: the imposition of sentence was suspended on both counts and he was placed on probation for three years on the conditions that he obey all Federal, State and Local laws and that he comply with all lawful rules and regulations of the probation officer. The above sentence was to begin and run concurrently (C.T. 7).

On July 22, 1971 the Court ordered defendant to show cause why his probation should not be revoked on the grounds that one, he failed to make monthly written reports to his probation officer; that two, he was arrested

^{2/} "C.T." refers to the Clerk's Transcript on Appeal.

on February 18, 1970 on the charge of suspicion of grand theft auto and possession of marihuana; and that three, he was arrested on November 19, 1970 and charged and convicted of conspiracy to smuggle marihuana (R.T. 3-4).^{3/}

On August 13, 1971, during the proceedings in this matter, defendant denied the above violations of probation (R.T. 5). However, afterwards defendant, through his counsel, stipulated that he failed to make monthly reports (R.T. 8). Defendant further stipulated that he was arrested on February 18, 1971^{4/} and was convicted of possession of marihuana and was sentenced to time served of thirty days. It was further stipulated that the defendant was charged with grand theft auto but that the State never filed against him on this charge (R.T. 8-9). And finally, it was stipulated that defendant was arrested on November 19, 1970 for conspiracy to smuggle marihuana and thereafter, on April 23, 1971, was found guilty by jury trial on the above charge; and on June 21, 1971 was sentenced to five (5) years in custody which he is presently serving (R.T. 9-10).

After these stipulations were entered into, defendant took the witness stand and testified that he failed to make

^{3/} "R.T." refers to the Reporter's Transcript of the proceedings on August 13, 1971

^{4/} Should read "February 18, 1970". Apparently defense counsel made a mistake as to the true date defendant was arrested on the State charge.

monthly reports because the probation officer failed to send him the proper forms (R.T. 10-12). Defendant further testified that he pled guilty to the State charge of possession of marihuana because he was then in custody and his attorney advised him that it was the most expedient way of getting out of jail (R.T. 12-13). As to defendant's Federal conviction for conspiracy to smuggle marihuana, defendant testified that this case was on appeal and that his attorney advised him that there was a "good chance of winning on appeal" (R.T. 13-14).

Following defendant's testimony the Court found that the defendant violated the terms and conditions of his probation in that he violated State law as to his conviction for possession of marihuana and further, that he violated Federal law by conspiring to smuggle marihuana in which he was found guilty by jury verdict and sentenced to five (5) years imprisonment (R.T. 18). As to whether the defendant failed to make monthly reports, the Court found that he did not because there was some doubt on that issue (R.T. 18).

Prior to the Court imposing sentence upon the defendant, his attorney urged that the proceedings be postponed until after defendant's Federal case on appeal (conspiracy to smuggle marihuana) was resolved. Such request was denied (R.T. 5, 18).

The Court thereafter set aside the probationary order

before imposed and sentenced defendant to seven (7) years, such sentence to run concurrent with the five (5) year sentence imposed on defendant June 21, 1971 for conspiring to smuggle marihuana.

III

ARGUMENT

DID THE COURT BELOW ABUSE ITS DISCRETION IN REVOKING DEFENDANT'S PROBATION?

Defendant urges that the Court below abused its discretion in revoking his probation because it grounded such revocation on defendant's Federal smuggling conviction which was still pending on appeal. In other words, defendant is arguing that before a court can revoke probation without abusing its discretion, the defendant should be convicted of the violation upon which revocation is based and such conviction should be affirmed on appeal.

The Government can find no authority for such a proposition and the defendant cites none in his brief. In fact, the law is clear that a valid conviction is not even necessary for a revocation of probation much less than having that conviction affirmed on appeal.

Bernal-Zazueta v. United States, 225 F.2d

64, 68 (9th Cir. 1955); and

(4th Cir. 1968).

A good and correct statement of the law on what is necessary for a judge to properly revoke probation was clearly expressed in Manning v. United States, 161 F.2d 827 (5th Cir. 1947) at 829 as follows:

"It may be, as appellant contends that the evidence on the probation revocation hearing would not be sufficient to support a conviction under federal laws for using the mails to defraud or under Alabama law for practicing medicine without a license. But proof sufficient to support a criminal conviction is not required to support a judge's discretionary order revoking probation. A judge in such proceeding need not have evidence that would establish beyond a reasonable doubt guilt of criminal offenses. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation."

[Emphasis added.]

The above statement of the law has not only been cited with approval by this Court in Bernal-Zazueta v. United States, supra, at 68, but in other circuits as follows:

Yates v. United States, 308 F.2d 737,

739 (10th Cir. 1962);

United States v. Clanton, 419 F.2d

1304, 1305 (5th Cir. 1969); and

United States v. Cates, 402 F.2d, 473

474 (4th Cir. 1968).

It should be further noted that a judge may even revoke a defendant's probation and properly base such revocation on a charge or violation of which the defendant was acquitted or which was dismissed in the interest of justice.

Bernal-Zazueta v. United States, supra

at 68; and

United States v. Clanton, supra at 1305.

However, in spite of all the above, defendant argues that the lower Court abused its discretion in revoking his probation by basing such revocation on his Federal smuggling conviction which was, at that time, still pending on appeal. The Government submits that this argument is contrary to law, without merit, and at most frivolous. As before stated, the law does not even require a valid conviction for a revocation of probation, much less than having that conviction affirmed on appeal. All that is

necessary for the judge to properly revoke probation is that he be reasonably satisfied that the evidence shows that the conduct of the probationer has not been as good as required by the conditions of probation.

The facts in the case before this Court today clearly shows that the lower Court properly exercised its judicial discretion in revoking defendant's probation. Not only did the Court find that defendant violated State law by being convicted on his plea of guilty for possession of marihuana, but that further, he violated Federal law by conspiring to smuggle marihuana in which he was found guilty by jury verdict. In both cases defendant's guilt was necessarily established beyond a reasonable doubt. Thus, the proof before the lower Court far exceeded that required by law in order to properly revoke defendant's probation.

Finally, it should be noted that:

"The law is well established that revocation of probation is an exercise of the trial court's broad discretionary power and such an action will not be disturbed in the absence of a clear showing of abuse of discretion."

United States v. Clanton, supra

at 1305-1306.

CONCLUSION

For all the foregoing reasons, the Government respectfully urges that the District Court's order revoking probation and imposing sentence be affirmed.

Respectfully submitted,

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NO. 71-2606

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JOHN J. BEANE,

Plaintiff-Appellant,

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SECRETARY OF HEALTH,
EDUCATION AND WELFARE,

Defendant-Appellee.

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Defendant-Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE ISSUES

1. Is there substantial evidence to support the decision of the Secretary that the plaintiff failed to establish that he is entitled to a period of disability under 42 U.S.C. §416 or to disability insurance benefits under 42 U.S.C. §423?

STATEMENT OF THE CASE

Jurisdictional Statement

The action below was brought under 42 U.S.C. §405(g) to review the final decision of the Secretary of Health, Education and Welfare on November 12, 1969, disallowing plaintiff's application for the establishment of a period

of disability and for disability insurance benefits under 42 U.S.C. §§416(i), 423. On February 16, 1971, pursuant to Defendant's Motion For Summary Judgment, the District Court entered its Judgment affirming the decision of the Secretary. Plaintiff filed a timely Notice of Appeal therefrom, and this Court has jurisdiction for this direct appeal pursuant to 28 U.S.C. §1291.

Statement Of Facts

The plaintiff filed an application for a period of disability and for disability insurance benefits on January 9, 1968 (the transcript of the administrative record is designated herein as Tr.; Tr. 93-96), alleging that he became unable to work on March 15, 1968, at age 38. The application was denied initially (Tr. 120-21) and on reconsideration (Tr. 165-66) by the Bureau of Disability Insurance of the Social Security Administration, after the California state agency, upon evaluation of the evidence by a physician and a disability examiner, had found that the plaintiff was not under a disability (Tr. 117-18, 162-63).

The plaintiff then requested a hearing which was held on March 17, 1969, at Long Beach, California, where the plaintiff, his wife and a vocational expert appeared and testified (Tr. 24-92). The hearing examiner considered

this testimony and all the other evidence of record de novo and on March 19, 1969, issued his decision finding that the plaintiff was under a disability within the meaning of the Act starting on March 15, 1967, and, therefore, was entitled to a period of disability and to disability insurance benefits under the Act (Tr. 19-20).

The Appeals Council, on its own motion, reviewed the hearing examiner's decision and on November 12, 1969, after receiving additional evidence and considering the entire record de novo, issued its decision finding that the plaintiff was not disabled on or before December 31, 1967, when he was last in insured status, and, therefore, was not entitled to a period of disability or to disability insurance benefits under the Act (Tr. 11-16). The Appeals Council's decision is, therefore, the final decision of the Secretary of Health, Education, and Welfare and is now subject to review by this Court.

The facts in the administrative record substantiating the conclusion of law of the District Court that there was substantial evidence to support the Secretary's decision will be interwoven with the legal argument to follow in support of that proposition.

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION OF THE SECRETARY

Under 42 U.S.C. §405(g), the jurisdiction of the Court is limited to the single question of whether or not the findings of the Secretary of Health, Education, and Welfare are supported by substantial evidence. This specific statutory restriction upon judicial review of the Secretary's decision is applicable to the findings of fact if supported by substantial evidence and extends as well to the inferences drawn therefrom if they have a substantial basis in the record. Mark v. Celebrezze, 348 F.2d 289, 293 (9th Cir. 1965).

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and it must be based on the record as a whole." Celebrezze v. Bolas, 316 F.2d 498, 501 (8th Cir. 1963). Where there is substantial evidence both for and against the claimant the Court in proceedings such as these is not authorized to weigh the evidence and substitute its judgment for that of the Secretary but must affirm the Secretary's decision. Celebrezze v. Bolas, supra, at 506; Miller v. Flemming, 275 F.2d 763, 765 (9th Cir. 1961).

The plaintiff, who was born on May 17, 1928, completed high school and attended night school where he studied electronics, the machinist trade, and interior decorating

(Tr. 33-36). Most of his work experience has been in sail making and drapery making, and similar work with light and heavy fabrics, using a power sewing machine (Tr. 38-43). The plaintiff had been employed at a Navy yard, supervising a group of 12 men in the making of sails, drapes, and rugs for ships when he allegedly became unable to work on March 15, 1967, due to a back and head injury (Tr. 47-50, 93).

The plaintiff's earnings record (Tr. 98) shows that he last met the special requirements for insured status under the Act on December 31, 1967 (Tr. 120, 165). The burden of proof was on the plaintiff to establish his entitlement to benefits under the Act. Seitz v. Secretary, 317 F.2d 743 (9th Cir. 1963). It was incumbent upon the plaintiff to prove that, commencing on or before December 31, 1967, he was "disabled" within the meaning of the Social Security Act, that is, that he suffered from a medically determinable impairment which had lasted or could be expected to last for a continuous period of not less than twelve calendar months and which was so severe as to render him unable to engage in any substantial gainful activity. Whether there was substantial evidence in the record to support the Appeals Council's finding that the plaintiff was not thus disabled is the sole issue before the court on this review of the Appeals Council's decision.

A substantial part of the medical evidence in the

record is devoted to problems which arose after the plaintiff ceased to be in insured status. It is well settled that evidence of a condition arising or becoming severely disabling subsequent to the expiration of the plaintiff's insured status cannot have retroactive effect. Steiner v. Gardner, 395 F.2d 197 (9th Cir. 1968). The only report which pre-dates the expiration of the plaintiff's insured status is from the Los Altos Hospital in Long Beach dated October 1967 (Tr. 100-106). The final diagnoses were of hypertension and pneumonia with pleurisy, but the bilateral pulmonary infiltrates cleared within a week and there was no evidence of a significant cardiovascular problem. A 1968 report from Dr. Thomas Wright, a general surgeon, did refer to difficulties as early as 1965, but these were clearly of no significant severity or duration. The plaintiff had a hemorrhoidectomy in June 1965, and a fistula was removed from the rectum in August 1965. Recoveries were uneventful. That report also noted a dizzy spell in October 1965 (Tr. 123-25).

A medical report from Dr. Patrick J. Belvin, a general practitioner, noted the plaintiff's March 1967 accident. The report, dated April 1968, gave diagnoses of recurrent and persistent labyrinthitis, enlarged heart, elevated blood pressure, and obesity. Apart from the enlarged heart, blood pressure, and overweight condition, the physical findings were nil (Tr. 139-41).

As late as July 1968, seven months after the plaintiff's insured status expired, Dr. Leroy I. Hyde, an internist, found that there was no indication for limitation of activities and no objective evidence of any neurological disease. The doctor noted that the plaintiff's hypertension would improve with weight loss and that the plaintiff should, to this end, return to regular work and normal routine (Tr. 151-53). In November 1968, a neurosurgeon noted the plaintiff's complaints of dizzy spells and concluded that the plaintiff could not engage in any sustained physical effort. This conclusion, offered almost a year after the plaintiff's insured status expired, was based on the plaintiff's subjective complaints which, while entitled to consideration, are not sufficient to sustain a finding of disability within the meaning of the Act. 20 C.F.R. §404.1501(c). Later, in 1969, the plaintiff was diagnosed as having diabetes mellitus (Tr. 200, 219).

While the evidence may show that the plaintiff is not presently able to work, this does not satisfy the plaintiff's burden of showing such inability at the time he was in insured status. For this reason, the Appeals Council properly discounted the vocational expert's testimony to the effect that as of the date of the hearing in March 1969, there was no work the plaintiff could do (Tr. 89-90). The Appeals Council's conclusion that the

plaintiff was not prevented from working at the time he was in insured status is supported not only by the medical evidence, but by the plaintiff's work history which shows that he did work subsequent to the alleged date of onset and subsequent to the date his insured status expired.

20 C.F.R. §404.1534; Simmons v. Celebrezze, 362 F.2d 753 (4th Cir. 1966); Stumbo v. Gardner, 365 F.2d 275 (6th Cir. 1966).

A phone contact was made on May 13, 1969, by the district office to Mr. Swan, a co-worker of the plaintiff. Mr. Swan advised that the plaintiff had done the same type of work as he, i.e., laying rugs in ships, hanging drapes, upholstery work, and making covers for machinery and furniture. He added that the plaintiff was sick during the March 1967-March 1968 period as he "had high blood pressure and terrific headaches." Mr. Swan stated that the plaintiff's work "slowed down some" during the last year he worked (Tr. 212).

Mr. Hendrickson, Director of Industrial Relations, Long Beach Naval Shipyard, forwarded a certified extract of the plaintiff's wages by pay periods from March 12, 1967 through March 23, 1968. In addition, he submitted a complete breakdown of sick and annual leave used from March 15, 1967 through March 21, 1968. This latter report shows that during the work period March 15, 1967 (the plaintiff's alleged onset date of disability) through

September 27, 1967, the claimant used no sick leave but did use 100 hours of annual leave and was charged 35 hours "leave without pay." Not until the latter part of September 1967 did the plaintiff use any sick leave. His leave record disclosed that he was charged with 128 hours sick leave from September 29, 1967 until October 20, 1967. (Presumably, this sick leave relates to a period of hospitalization (October 2, 1967 - October 9, 1967) wherein he was treated for pneumonia and hypertension.) Thereafter, until his work terminated on March 21, 1968, the plaintiff's employment record shows that 4-3/4 days of sick leave were used. This report showed, from March 15, 1967 through March 20, 1968, that the plaintiff used a total of 22-1/2 days annual leave, 20-3/4 days sick leave and 13-5/8 days, leave without pay (Tr. 215).

Along with the leave record, a record of the plaintiff's wages shows bimonthly wages averaging over \$200 in each pay period. It is interesting to note that in 12 of these pay periods, (after his alleged date of disability), the claimant had overtime wages ranging from \$44 to \$177 (Tr. 215).

There is thus substantial evidence in the record to support the conclusion of the Appeals Council that the plaintiff was not under a disability within the meaning of the Act commencing on or before December 31, 1967, when he last was in insured status.

CONCLUSION

The Judgment of the District Court should be affirmed.

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NO. 71-2605

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP TRIBE,

Plaintiff-Appellant,

vs.

GEORGE KINNEAR, as Director
of the Department of Revenue,
State of Washington,

Defendant-Appellee,

APPEAL FROM THE WESTERN

DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT - PUYALLUP TRIBE

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STATEMENT OF ISSUES

(1) Whether the Court below should have decided that it has jurisdiction pursuant to 28 U.S.C. 1362.

(2) Whether the provisions of 28 U.S.C. 1341 which forbids district courts from enjoining, suspending, or restraining the assessment, levy or collection of a state tax was correctly applied against appellant, Puyallup Tribe.

(3) If such provision does not apply to appellant, Puyallup Tribe, whether the Court below was correct in staying all proceedings.

STATEMENT OF THE CASE

Nature of the Case

The Puyallup Tribe, as plaintiff-intervenor, brought suit against the Director of the State of Washington Department of Revenue seeking injunctive and declaratory relief against the State for applying certain state revenue statutes to said Tribe and its members in Indian Country and for coming on such land for the purpose of enforcing such revenue statutes.

Course of Proceedings and Disposition Below

Corwin King was the original plaintiff in this case seeking injunctive and declaratory relief. The

Puyallup Tribe sought and was granted leave to intervene as plaintiff.

Defendant Kinnear as Director of the State of Washington Department of Revenue moved to dismiss the action on the basis that the Court has no jurisdiction pursuant to 28 U.S.C. 1341 and that the complaint failed to state a claim upon which relief could be granted.

A hearing on the motion was held and the motion was not granted. The Court requested briefs from all parties regarding jurisdictional questions and the propriety of remanding the case to state court.

On August 6, 1971, an order staying proceedings in district court was entered.

Statement of Facts

Appellant, Puyallup Tribe of the Puyallup Reservation, in its complaint (Record p. 146) alleged the following facts: (1) It is an Indian tribe with a governing body duly recognized by the Secretary of Interior. (2) Its reservation includes land held in a restricted or trust status by the United States. (3) Agents of the State of Washington Department of Revenue came on to such reservation

land for the purpose of confiscating cigarettes being sold thereon without state tax stamps being affixed.

(4) The State of Washington has no jurisdiction to come on to such reservation land for tax purposes. (5) The Puyallup Tribe was and will be damaged unless the Court enjoins the State from further entry upon said land and from asserting alleged state jurisdiction for tax purposes over said land and transactions thereon.

Defendant filed no answer but made a motion to dismiss (Record p. 12) as discussed above.

ARGUMENT

Summary

Pursuant to 28 U.S.C. 1291, the Puyallup Tribe is appealing the order entered by the district court which stayed all proceedings. Such an order is appealable. Idlewild Bon Voyage Corp. v. Epstein, 370 U.S. 713, 715, n. 2 (1962).

It is contended that the district court erred in the following ways: (1) It should have decided rather than merely assumed that it had jurisdiction. (2) It was incorrect in applying 28 U.S.C. 1341 to an action by an Indian tribe. (3) It erred in refusing to hear the case and in

staying all proceedings.

I.

THE COURT SHOULD HAVE DECIDED THAT IT HAD JURISDICTION PURSUANT TO 28 U.S.C. 1362.

Congress provided in 28 U.S.C. 1362 that the district courts shall have original jurisdiction of all civil proceedings brought by an Indian tribe with a duly recognized governing body when the matter in controversy arises under the Constitution, laws or treaties of the United States.

The issues presented in the Puyallup Tribe's complaint relating to the reservation lands arise under the Constitution, laws or treaties of the United States, i.e. they are federal questions. See the House Report on Sec. 1362, H.R. Rep. No. 2040, 1966 U.S. Code Cong. and Admin. News, p. 3146, which provides in part:

"In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are federal issues." (Emphasis added)

It is clear on the face of the statute as well as from legislative history that Congress specifically intended to provide a federal forum to Indians in cases

involving such questions. See House Report on Sec. 1362, supra, which provided:

"The Department therefore observed that particularly as to this class of cases it is appropriate that the actions be brought in a U.S. District Court....[T]he Department of the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified."

Legislative history from the same report indicates that there is a special relationship between Indian tribes and the federal government, and the district courts have jurisdiction when the United States brings a suit as trustee for Indians. Sec. 1362 would provide, according to the report, that when an action is not brought on behalf of a tribe by the United States Attorney, a tribe is nonetheless assured of the same jurisdiction when the action is brought by its own attorneys.

It is, therefore, contended that the Court below had jurisdiction of the instant case pursuant to 28 U.S.C. 1362 and should have clearly decided such rather than merely "assuming" it.

II.

THE DISTRICT COURT INCORRECTLY APPLIED 28 U.S.C. 1341 TO AN ACTION BY AN INDIAN TRIBE.

28 U.S.C. 1341, upon which the Court below relied, provides that a district court shall not enjoin the enforce-

ment of state tax when there is an adequate remedy for the complainant in the state courts. It is clear from both case law and legislative history, however, that this statute has no application when an Indian tribe is seeking such injunctive relief.

In Agua Caliente Band of Mission Ind. v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) individual Indians and an Indian band sought to enjoin the levy of a California tax on lessees of Indian land. The defendant County alleged that the Court was deprived of jurisdiction by virtue of Sec. 1341. This Court of Appeals denied that contention stating that it has been held that Sec. 1341 is inapplicable to cases involving the United States and instrumentalities thereof and that Indian property is an instrumentality of the United States. The Court then held at 1186:

"The reasons given in United States v. Livingston, supra for exempting the instrumentalities of the United States from the operation of 28 U.S.C. 1341 are no less cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff with the United States. We conclude that the district court did have jurisdiction."

In Frank, et al v. Kinnear, Civ. No. 71-517 (D. Ore. 1971) individual Indians sought injunctive relief

against the Director of the Department of Revenue of the State of Washington for his attempts to enforce certain state revenue statutes in Indian Country. The State moved to dismiss on the basis of 1341 and the Court denied such motion stating at pp. 2-3 of the Memorandum of Opinion:

"However, 28 U.S.C. 1341 does not preclude the federal courts from entertaining suits to enjoin state taxes assessed against Indian property.... Therefore, this court has jurisdiction."

The two cases cited by the Court below in its order are clearly distinguishable and not relevant to the instant case. In Great Lakes & Dock Co., et al v. Huffman, 319 U.S. 293 (1943) non-Indian plaintiffs sought a declaratory judgment that a state tax could not be applied to them. The Supreme Court held that just as a federal court should not enjoin a state tax neither should it issue a declaratory judgment that the tax is invalid. However, exceptions were later carved out by the Supreme Court and this Court of Appeals providing that the anti-injunction rule does not apply to the United States [United States v. Livingston, 179 F.Supp. 9 (E.D. S.C. 1959), aff'd mem., 364 U.S. 281 (1960).] or to Indian tribes; these exceptions equally apply to declaratory judgment suits by the United States or Indian tribes.

Geo. F. Alger Co., et al v. Peck, 347 U.S.

984 (1954) is nothing more than a per curiam opinion affirming a district court's order dismissing an action by a non-Indian seeking an injunction against a state tax. The case merely states the general rule enunciated in 1341. It is easily distinguishable from the instant case in that the plaintiffs in Alger were not Indians.

It is clear that the district court's reliance in the instant case on 1341 and on the Great Lakes & Dock and Alger cases was in error. Its refusal to follow the holding of this Court of Appeals in Agua Caliente should be reversed.

III.

THE COURT ERRED IN STAYING ALL PROCEEDINGS AND SHOULD BE DIRECTED TO HEAR THE CASE ON ITS MERITS WITHOUT FURTHER DELAY.

After citing to 1341 and the Great Lakes & Dock and Alger cases, the Court below stayed all proceedings pending exhaustion of state remedies by plaintiffs as contemplated by 1341. To uphold such an order, this Court would be forcing the Puyallup Tribe to forego the very remedies which Congress specifically provided.

There was no reason for the Court below to stay all proceedings in federal court. The Court clearly had

jurisdiction under 1362. There were no questions presented regarding the interpretation of unclear state laws. All the questions presented arose under the Constitution, treaties, or laws of the United States; for example, the existence of the reservation, jurisdiction over federal land within that reservation, and the applicability of state revenue laws allegedly in conflict with treaties and federal statutes are all federal questions.

That such questions should be decided in a federal forum was the intent of Congress. A district court entering the type of order it did in the instant case only subverts that congressional intent.

Any remaining questions regarding exhaustion of state remedies by plaintiffs or abstention should be resolved summarily in plaintiffs' favor as they were in Great Lakes Inter-Tribal Council v. Voight, 309 F.Supp. 60 (W.D. Wis. 1970). The Court there ruled at 64 that to require exhaustion of state remedies or abstention "would be to dilute the Congressional intention to provide to the Indians a federal forum for just such questions as those presented here."

This Court, therefore, should reverse the District Court's order staying all proceedings and should order the Court to hear the case on the merits forthwith.

CONCLUSION

The Puyallup Tribe requests this Court to grant the following relief:


(1) Reverse the District Court's order and direct it to take jurisdiction in this case.

(2) Reverse the District Court's order staying proceedings and direct it to hear the case on its merits without further delay.

(3) Grant such other relief as it deems necessary or equitable.

DATED this 27 day of December, 1971.

Respectfully submitted,


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In the
United States
Court of Appeals FILED

For the Ninth Circuit

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71-2605—71-2672

W/A. B. LUCK, CLERK

JACK MOSES,
PUYALLUP TRIBE

Plaintiffs-Appellants,

v.

GEORGE KINNEAR,
as director of the Department of Revenue, State
of Washington, *Defendant-Appellee.*

APPEALS FROM THE UNITED STATES DIS-
TRICT COURT FOR THE SOUTHERN
DISTRICT OF WASHINGTON

HONORABLE GEORGE H. BOLDT, JUDGE

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In the
United States
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71-2605—71-2672

JACK MOSES,
PUYALLUP TRIBE *Plaintiffs-Appellants,*
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GEORGE KINNEAR,
as director of the Department of Revenue, State
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APPEALS FROM THE UNITED STATES DIS-
TRICT COURT FOR THE SOUTHERN
DISTRICT OF WASHINGTON

HONORABLE GEORGE H. BOLDT, JUDGE

BRIEF OF APPELLEE

STATEMENT OF ISSUES

1. Is the Stay Order entered by the District Court an appealable Order pursuant to 28 U.S.C. 1291?
2. Does the district court have authority to stay proceedings pending exhaustion of state remedies?

STATEMENT OF THE CASE

One Corwin King and the appellant, Moses, in separate suits, sought declaratory and injunctive relief against tax officials of the State of Washington in the district court to prevent these officials from enforcing the revenue laws of the state of Washington. The appellee moved to dismiss these complaints on the basis that (1) they failed to state a claim, and (2) the district court did not have jurisdiction on the basis of 28 U.S.C. 1341. The appellant, Puyallup Tribe, sought and was granted the right to intervene and filed an Intervenor's Complaint seeking declaratory and injunctive relief in both the King action and the Moses action. The district court on August 6, 1971, while retaining jurisdiction, entered an Order Staying Proceedings and directed the parties to exhaust their remedies in state court. Thereafter, the Puyallup Tribe filed in effect an Amended Complaint in Intervention again seeking declaratory and injunctive relief which was filed August 9, 1971.

It is significant in reviewing these proceedings to note the factual differences between the King and the Moses situations. Appellant Moses, though allegedly a member of the Puyallup Tribe, now acknowledges that the land described in his complaint and on which he was vending cigarettes and other tobacco products was never inside the exterior boundaries of the original Puyallup Indian Reservation. (Cf. Appendix B of this brief, wherein this

is confirmed by the U. S. Department of the Interior.) Likewise, the land described in the Puyallup Tribe's original complaint, which is the same as that described in the Moses complaint, was outside the original reservation. On the other hand, the land described in the King complaint, and on which King was selling cigarettes, is inside the exterior boundaries of the original reservation. But King makes no claim to be a member of the Puyallup Tribe, but rather claims that he is a member of the Samish Tribe. Further, the original complaint of the intervenor Puyallup Tribe, while specifically describing only the Moses location, *i.e.*, the location outside the original boundaries of the reservation, was filed in both the Moses action and the King action, and clearly appears to raise the issue of the applicability of the state cigarette tax laws to locations inside those exterior boundaries.

The procedural significance of these facts will be discussed in the appellee's argument. Also, because of the procedural morass generated by the many actions commenced by the parties hereto in both the United States District Court and the superior courts of the state of Washington involving the sale of cigarettes and other tobacco products at these two locations in Pierce County, *i.e.*, the Moses location and the King location, we feel that it is useful in understanding this appeal to list them in chronological order. See Appendix A attached hereto.

ARGUMENT

By order of this Court, the appellee was permitted to file a consolidated brief answering both appeals No. 71-2605 and No. 71-2672. Unless otherwise indicated, this answer is responsive to the arguments raised in both appeals.

A. The Order Of The Federal District Court Is Not An Appealable Order.

The law is well settled that an order of the type entered by the district court in this case is not an appealable order pursuant to 28 U.S.C. 1291. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249 (1955); *City of Thibodeaux v. Louisiana Power & Light Co.*, 255 F.2d 774 (1958). Appellant, Puyallup Tribe, at page 3 of its brief (No. 71-2605) cites *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 8 L. Ed.2d 794, 82 S. Ct. 1294 (1962), as authority that the order entered is appealable under 28 U.S.C. 1291. A careful reading of this case does not support this proposition. The decision of the United States Supreme Court in *Idlewild Liquor Corp.*, *supra*, merely held that a court of appeals has jurisdiction to review the decision of a district court as to the propriety of empaneling a three-judge district court. This is all this case stands for.

B. The District Court Properly Entered The Stay Order Being Appealed From.

1. The Case Of *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 89 L. Ed. 101, 65

S. Ct. 152 (1944), Not Only Supports The Issuance Of The Stay Order But Compels Its Issuance.

Spector was brought in a United States district court to enjoin the enforcement of a state tax and for a declaratory judgment seeking to invalidate the tax. Both the district court and the court of appeals in reaching their decision were required to characterize the nature and effect of the taxing statutes. In reaching its decision, the Supreme Court gave the following rationale:

“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. [Citing cases.] Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.” 323 U.S. at 105.

The court then made the following disposition:

“We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause

to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion." 323 U.S. at 106.

In *Spector*, the district court had no authoritative pronouncement to guide it as to the nature and application of the statute under attack. Not only is the same true here, but, we suggest, the key issues in this litigation are predominately state issues. To understand why this is so, we turn to the decision of this Court in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (1966):

"In 1953, federal legislation was enacted to enable states to supplant, in large measure, federal jurisdiction over offenses in Indian country, and over civil causes of action which arise in Indian country. Public Law 280, 67 Stat. 588 (1953). Under sections 2 and 4 of this act (18 U.S.C. § 1162, 28 U.S.C. § 1360 [1964], Congress granted several states, not including Washington immediate jurisdiction of this kind in designated Indian country located within those states. Under section 6 of the 1953 act, Congress authorized states with constitutional or statutory impediments to the assumption of such jurisdiction to remove these impediments and assume jurisdiction. Under section 7 of the act, Congress authorized any other state to extend jurisdiction of this kind to Indian country lying within those states.

"Because of Washington's constitutional disclaimer of jurisdiction over Indians, section

6 of Public Law 280 is applicable to that state. Purporting to act pursuant to the authority conferred under that section, the Washington legislature enacted chapter 240, Laws of 1957 (RCW 37.12).

"It was provided in this act, with exceptions not here relevant, that whenever the governor of the state shall receive from the tribal council or other governing body of any Indian tribe a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state, the governor shall issue a proclamation, after which the state shall assume such jurisdiction. Under this act, state jurisdiction thus extended to Indians and Indian lands was to be exerted to the same extent as exerted elsewhere in the state. 368 F.2d at 651, 652.

"* * *

"In 1963, the state legislature enacted chapter 36, Laws of 1963, amending chapter 240, Laws of 1957. Under the 1963 act, the state of Washington purported to invoke immediate criminal and civil jurisdiction over some Indians and Indian territory, reservations, country and lands within the state, without the need of a prior Indian resolution and a gubernatorial proclamation. It was provided, however, that with respect to Indians on tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, such resolution and proclamation procedure must be followed in

order to invoke state jurisdiction, except with regard to eight categories of problems. RCW 37.12.010 as amended, 37.12.021." 368 F.2d at 652.

For ease of reference, we quote in full the language of RCW 37.12.010.

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of section 5 of this amendatory act have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided Further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before the effective date of this amendatory act shall

remain subject to state civil and criminal jurisdiction as if this amendatory act had not been enacted."

This Court has already recognized the complexity of this statute in its opinion on re-hearing in *Gallagher*, wherein it stated:

"The scope of chapter 36 [now codified as chapter 37.12 RCW] is summarized in our earlier opinion, opposite note 2. We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation. In chapter 240, Laws of 1957, this Indian resolution and governor's proclamation procedure applied to all exertions of state jurisdiction." 368 F.2d at 657, 658.

Under the issues presented by the Moses complaint, the King complaint and the Puyallup Tribe complaint, the following questions arise as to the application of RCW 37.12.010:

1. Does the Moses location constitute "Indian territory * * * country, and lands * * *" within the meaning of RCW 37.12.010?

2. As to sales of cigarettes within the original boundaries of the Puyallup Indian Reservation, what constitutes "* * *" an established Indian

reservation * * *” within the meaning of RCW 37.12.010? (For a history of the Puyallup Reservation which shows the seriousness of this question, see *Department of Game v. Puyallup Tribe*, 70 Wn.2d 245, 422 P.2d 754, affirmed 391 U.S. 392, 20 L. Ed.2d 689, 88 S. Ct. 1725 (1968).¹

3. If the King location is “* * * within an established Indian reservation * * *”, does state jurisdiction nevertheless extend to a non-Puyallup Indian such as King? Stated otherwise, would only a Puyallup Indian such as Moses be outside the ambit of state jurisdiction?

4. If the King location is “* * * within an established Indian reservation * * *”, can the state nevertheless enforce its revenue laws against non-Indian purchasers at such a location?

It should be noted that Judge George H. Boldt was the trial judge in the case of *Quinault Tribe of Indians v. Gallagher, supra*, and is thus familiar with both the issues raised by the pleadings in this litigation and the complexities of RCW 37.12.010.

In order to resolve the various issues of state law, the appellee herein, the Department of Revenue,

¹We make reference to *Department of Game v. Puyallup Tribe*, a fishing rights case, with certain hesitancy. First, Public Law 83-280 clearly excepts from its grant to state authority any power to regulate Indian fishing in a manner contrary to treaty, i.e., questions relating to treaty fishing rights are to remain predominantly federal questions (P.L. 83-280 § 2 (b)). Secondly, based upon certain research done by the office of the Regional Solicitor of the Department of Interior in Portland, Oregon, we must admit, that as to certain details, the history of the original Puyallup Reservation, as stated in the State Supreme Court's decision, may not be complete.

However, by reference to this case we are simply pointing out that exactly this same type of historical analysis is necessary in order to determine whether the original Puyallup Reservation or any part thereof is “an established Indian Reservation” within the meaning of RCW 37.12.010.

commenced a declaratory judgment action against the appellants herein in the Superior Court for Pierce County, Washington (Superior Court No. 45357). A declaratory judgment for the determination of these issues is authorized under Washington law; see chapter 7.24 RCW. The only effective difference between the present posture of this litigation and that directed by the United States Supreme Court in *Spector Motor Service v. McLaughlin*, *supra*, is that here the state rather than the taxpayers has taken the initiative in commencing a declaratory judgment action to determine these issues.

2. The Stay Order Of The District Court Is Also Supported Under The Rationale Of *Great Lakes Dredge And Dock Co. v. Huffman*, 319 U.S. 293, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943).

In their discussion of the *Huffman* case (Moses Br. No. 71-2672, p. 9, and Tribe Br. No. 71-2605, pp. 7, 8), the appellants, we suggest, completely misconstrue the import of that case.

The case commenced in a federal district court as a declaratory judgment action contesting, on constitutional grounds, the Louisiana unemployment compensation tax. The district court, in reaching the merits of the action, found the tax constitutional, dismissed the action, and the court of appeals affirmed. The United States Supreme Court also affirmed, but the grounds of its affirmance is the important factor here.

The Supreme Court first noted that the anti-injunction act, now codified as 28 U.S.C. 1341, was not applicable by its terms to a declaratory judgment action, and deliberately refrained from answering the question of whether it should be construed to cover declaratory judgments. Nevertheless, it held that the district court should not have rendered a decision on the merits, stating:

“The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court’s discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits.” 319 U.S. at 301, 302.

This emphasis upon the trial court’s discretion is the key factor here. The trial court in this litigation did not actually apply the anti-injunction act. For if it had, it would have dismissed the actions, while in fact it retained jurisdiction. But it did exercise its discretion in staying the proceedings. Under *Huffman*, that discretion could have taken the form of an outright dismissal; but certainly *Huffman* allows a less drastic exercise of discretion, *i.e.*, the exercise of discretion which the trial court actually made by retaining jurisdiction while staying the proceedings.

We recognize that application of *Huffman* is dependent upon there being an adequate remedy in state court. However, that condition is met here. We point out again that a state court action is presently pending, although brought by the appellee rather

than the appellants. And we further point out that, had the appellants so desired, they could have brought a declaratory judgment action (see chapter 7.24 RCW) and/or an injunctive action (see RCW 82.32.150), as alternatives to a refund action under RCW 82.32.180.

3. The Fact That The Puyallup Tribe Has Intervened In The King Action And The Moses Action Does Not Change The Procedural Posture Of This Litigation.

In its brief, the Puyallup Tribe relies strongly on the recent decision of this Court in *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (1971). In this decision, this Court refused to apply the anti-injunction act, 28 U.S.C. 1341, in an injunctive action brought by an Indian tribe. But here we do not reach the question of the applicability of that case, for the simple reason that the trial court in this case did not apply the anti-injunction act either. While we do not admit that this refusal to apply the act is correct, we do contend that it eliminates any question involving the applicability of the *Agua Caliente* case.

Further, note that in *Spector Motor Service v. McLaughlin*, *supra*, discussed at pages 4 through 11 of this brief, the court noted that the anti-injunction act and the *Huffman* case were both inapplicable because of uncertainties surrounding the adequacy of the taxpayer's remedies in state court, but nevertheless required the district court to stay

proceedings pending a state court action to resolve the state issues.

Finally, the importance of the Tribe's being just an intervenor, rather than a separate plaintiff in a separate action, must be emphasized. The district court had discretion to either treat that complaint in intervention as a separate action, or to view it as merely ancillary to the main actions brought by King and Moses. As stated in *Fuller v. Volk*, 351 F.2d 323 (1965):

"However, the question remains whether their intervention can cure the jurisdictional defect thereby giving the district court jurisdiction. It is well settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit. [Citations omitted.]

"However, a court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor. [Citations omitted.]" 351 F.2d at 328.

The Tribe simply has no legitimate complaint if the trial court, in the exercise of its discretion, failed to treat the pleadings of the intervenor as a separate action, and thus treated the Tribe in the same manner as the original plaintiffs.

CONCLUSION

Appellant Moses (No. 71-2672) raises, at pages

10 through 19 of his brief, certain issues relating directly to the merits of this case. We do not attempt to answer these contentions, simply because the only issues on this appeal are the appealability of the trial court's stay order and the propriety of the stay order. For the reasons given above, that order should be affirmed.

Respectfully submitted,

SLADE GORTON,

Attorney General

JAMES A. FURBER,

Special Assistant Attorney General

TIMOTHY R. MALONE,

Senior Assistant Attorney General

Attorneys for Appellee

APPENDIX

APPENDIX "A"

CHRONOLOGY OF PROCEEDINGS INSTITUTED TO DATE

The location directly involved in the Moses appeal was located within the exterior boundaries of the City of Puyallup and while situated on restricted fee land was outside the exterior boundaries of the original Puyallup Indian Reservation (hereinafter referred to as Moses'). The other location was and is located within the exterior boundaries of the City of Tacoma (hereinafter referred to as King's), which is situated on restricted fee land within the exterior boundary of the original Puyallup Indian Reservation. In every case listed below, the ultimate question is whether the cigarettes and other tobacco products can be vended without affixing revenue stamps and reporting Washington's retail sales and business and occupation taxes on the sale of these products.

The "kick-off" to these actions commenced when Revenue agents of the State of Washington distrained and seized unstamped cigarettes and other tobacco products destined for or held for sale at these locations. Thereafter, the following cases or proceedings were instituted:

1. Robert Satiacum, allegedly an enrolled member of the Puyallup Indian Tribe, and presumably a partner of Mr. Corwin King, on January 21, 1971, commenced an action in the form of Petition for Return of Seized Property in the Superior Court for Pierce County, Cause No. 200888 (71-2605 Rec-

ord p. 19). This action was later voluntarily dismissed by Mr. Satiacum on May 4, 1971.

2. Corwin King, allegedly an enrolled member of the Samish Indian Tribe, on February 2, 1971, commenced an Action For Declaratory Judgment and Injunction in the United States District Court for the Western District of Washington, No. 4243 (71-2605 Record p. 1). Robert Satiacum was not a party to this action but Mr. King's Affidavit in Support of his Temporary Injunction against the State of Washington recited that he "was involved in a business matter with Robert Satiacum", (71-2605 Record p. 4). A temporary injunction was presented ex parte and signed February 3, 1971 by Judge William N. Goodwin, (71-2605 Record p. 7), which was subsequently dissolved by Judge George H. Boldt. On March 5, 1971, King requested a three Judge District Court be convened, which request was argued in the briefs but was never presented orally to the Court (71-2605 Record p. 33).

3. On February 23, 1971, Jack Moses, allegedly an enrolled member of the Puyallup Indian Tribe, brought an Action for Declaratory Judgment against the State of Washington in the United States District Court for the Western District of Washington (71-2672 Record p. 1), coupled with a Petition For Immediate Restraining Order and Order to Show Cause as to Why the Restraining Order Should not be made in Effect During Pendency of This Action (71-2672 Record p. 6). The Order to

Show Cause for Temporary Restraining Order was returnable April 19, 1971 (71-2672 Record p. 10).

4. Thereafter, the State of Washington filed, separately, Motions to Dismiss both Moses' (71-2672 Record p. 22) and King's Complaint (71-2605 Record p. 31) on the basis that the respective claims fail to state a claim against the defendant and for the further reason that the District Court lacked jurisdiction because of the provisions of 28 U.S.C. 1341. It should be noted here that while the principal thrust of the State's argument was based on 28 U.S.C. 1341, with Moses' recent acknowledgement that his location was outside the exterior boundaries of the original Puyallup Indian Reservation, it may well have been dismissed on the basis that the Complaint fails to state a claim.

5. On April 30, 1971, the attorneys for King, Moses and the State of Washington stipulated that the following matters be consolidated and presented to the Court (71-2672 Record p. 40). The matters were:

- A. Whether the above entitled Court has jurisdiction of this matter.
- B. Whether the above entitled matter requires a hearing before a panel of three judges.
- C. Requests a temporary restraining order against the defendant while the matter is pending.

6. On the day set for hearing on the matters stipulated above, the attorney for the Puyallup Indian Tribe appeared in Court and orally sought

and was permitted to intervene in the Moses and King cases. The stipulated matter before the Court was continued until a later date. Thereafter, the Tribe filed its Intervenor's Complaint on June 7, 1971 (71-2605 Record p. 104). The Order allowing the Puyallup Indian Tribe to intervene was entered June 14, 1971 (71-2605 Record p. 102).

7. On August 3, 1971, Silver Eagle Company, a motor common carrier, filed its Motion to Intervene (71-2672 Record p. 65), and noted it for hearing August 9, 1971 (71-2672 Record p. 87).

8. On August 4, 1971, Moses filed a Motion for Immediate Restraining Order and Order to Immediately Return Products [allegedly] Illegally Seized in Interstate Commerce and Order to Show Cause (71-2672 Record p. 88).

9. On August 6, 1971, the Honorable George H. Boldt entered an Order Staying Proceedings (71-2672 Record p. 101). The effect of this Order was to stay all proceedings in all the cases, to-wit: Moses', King's, and the Puyallup Tribe's pending exhaustion of state remedies.

After entry of Judge Boldt's Order on August 6, 1971, the following significant events occurred:

- A. On August 9, 1971, the Puyallup Tribe filed an amended Intervenor's Complaint for Declaratory and Injunctive Relief (71-2605 Record p. 146).
- B. On August 29, 1971, the United States of America, on behalf of the Department of Interior and the Puyallup Tribe commenced

in Federal District Court under cause No. 38-71C3, an ejectment action against Robert and Charles Satiacum to eject them from certain lands located within the exterior boundaries of the original Puyallup Indian Reservation. This land is the same as that described in the second legal description contained in paragraph four of the Puyallup Tribe's Amended Complaint in Intervention (71-2605 Record p. 148).

- C. On September 6, 1971, the Puyallup Tribe filed its Notice of Appeal from Judge Boldt's Order Staying Proceedings (71-2605 p. 154).
- D. On September 6, 1971, Moses filed his Notice of Appeal from the Order Staying Proceedings (71-2672 Record p. 105).
- E. Silver Eagle did not appeal.
- F. King did not appeal.
- G. On or about October 10, 1971, Corwin King brought an action in the Superior Court of Thurston County, Cause No. 45357 which was subsequently amended, seeking damages against the State of Washington in the amount of \$3,280,000.00.
- H. On July 27, 1971, Robert Satiacum and Buddy Satiacum brought an action in the Federal District Court under cause No. 22-71C3 seeking damages of \$2,000,000.00 from officers of the department of revenue.
- I. On October 29, 1971, the State of Washington filed a Complaint for Declaratory Judgment and Injunction in the Superior

Court of Pierce County, Cause No. 206490, against Jack Moses, Robert Satiacum and Charles Satiacum, individually and as representative members of a class and the Puyallup Tribe to test the question of whether cigarettes and other tobacco products can be vended within the exterior boundary of the original Puyallup Indian Reservation without complying with the revenue laws of the State of Washington.



APPENDIX "B"

IN REPLY REFER TO:

United States Department of the Interior

Title Plant

BUREAU OF INDIAN AFFAIRS

PORTLAND AREA OFFICE
POST OFFICE BOX 3785
PORTLAND, OREGON 97208

JAN 28 1972

Attorney General
State of Washington
Olympia, Washington 98501

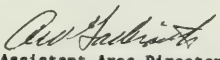
Attention: Mr. Timothy R. Malone
Sr. Assistant Attorney General

Dear Sir:

In response to your request of January 20, 1972 we enclose herewith a statement that the tract you have described is -

1. Under the control of the Bureau of Indian Affairs,
2. Located outside the boundary of the Puyallup Indian Reservation.

Also enclosed is a copy of the 1874 GLO Plat on which we have shown the approximate location of the tract in question.


Assistant Area Director
(Economic Development)

Enclosures



United States Department of the Interior Title Plant

BUREAU OF INDIAN AFFAIRS

PORTLAND AREA OFFICE

POST OFFICE BOX 3785

PORTLAND, OREGON 97208

January 28, 1972

The following statement is furnished in response to a recent request therefor from Timothy R. Malone, Sr. Assistant Attorney General, State of Washington:

As Chief of the Titles and Records Section, Portland Area Office, Bureau of Indian Affairs, I am the custodian of the official land ownership records of this Bureau pertaining to Indian land in the State of Washington.

The records of this office reveal that land described as:

That portion of the following described property lying Southerly of the Southerly line of State Road No. 5: Beginning at a point 265.14 feet North of the Southeast corner of Tract 2 of George O. Kelly's 2nd Subdivision of Part of the B. F. Wright D.L.C., No. 39 in sections 20, 21, 28, 29, Twp. 20 N., R. 4 E., W.M., as per map thereof recorded in Book 7 of Plats at Page 74, records of Pierce County Auditor; thence West 356.33 feet to a stake; thence North 345.47 feet to a stake on the bank of the Puyallup River; thence Easterly along the meander line of said river, 383.07 feet to the East line of said Tract 1; thence South along said East line 204.76 feet to the point of beginning.

is owned in restricted fee status ~~by~~ as follows:

1/2 by Anna Jack Comenout (an enrolled Tulalip Indian)

1/2 by Edward Comenout, Jr. (an enrolled Quinault Indian)

It is identified in our records as tract number 130-1027 and is located outside the boundary of the Puyallup Indian Reservation as set out in the General Land Office plat dated January 30, 1874, a copy of which is on file in this office.

James E. Dowling

James E. Dowling
Chief, Titles and Records Section

NO. 71-2605
71-2672

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP TRIBE,
JACK MOSES,

Plaintiffs-Appellants,

v.

GEORGE KINNEAR, as Director
of the Department of Revenue,
State of Washington,

Defendant-Appellee,

FILED

MAR 20 1972

WM. B. LUCK, CLERK

APPEAL FROM THE WESTERN

DISTRICT OF WASHINGTON

REPLY BRIEF OF APPELLANT - PUYALLUP TRIBE

John H. Sennhauser
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NO. 71-2605
71-2672

UNITED STATES COURT OF APPEALS
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APPEAL FROM THE WESTERN
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REPLY BRIEF OF APPELLANT - PUYALLUP TRIBE

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I.

THE ORDER IN THE INSTANT CASE IS APPEALABLE
PURSUANT TO 28 U.S.C. 1291, 1292

Respondent contends that the order entered in the instant case is not appealable. Although it contends that Idlewild Liquor Corp v. Epstein, 370 U.S. 713 (1962) does not support appealability, a closer examination of the case indicates the contrary.

In Idlewild the district court, 188 F. Supp. 434 (S.D. NY. 1960), ordered plaintiffs to first adjudicate its claims in a state court before the federal court would hear the case. The plaintiffs appealed and appellees asserted that the order was not final and, therefore, not appealable. This is exactly what has taken place in the instant case.

The Court of Appeals in Idlewild, 289 F.2d 426 (2d Cir. 1961), denied appellee's claim that the order was not final. It stated at 428:

There was nothing to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court -- any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on the ground of appealability.

The U.S. Supreme Court agreed with the Court of Appeals decision on the "finality" of the order stating

at 715 (n. 2):

The Court of Appeals properly rejected the argument that the order of the District Court 'was not final and hence unappealable under 28 USC 1291, 1292,' pointing out that 'appellant was effectively out of court.'

Since the order in the instant case is virtually the same and has the same effect as that in Idlewild, it is clear that it is a final and, therefore, appealable order.

Also relevant is Turner v. City of Memphis, 369 U.S. 350 (1962) in which the district court ordered plaintiff's suit held in abeyance pending state court adjudication which should be commenced. On appeal the U.S. Supreme Court stated that plaintiffs had perfected appeal to the 6th Circuit and then directed the District Court to enter the injunction prayed for by plaintiffs.

See also 3 MOORE, FEDERAL PRACTICE 110.20 (4.-2) at 251 (2d. ed. 1970) which states:

If there is no action pending in a state court and the district court stays the action before it and directs the parties to go to the state to obtain a ruling as to what the state law is, the stay is appealable as a final order under 28 USC 1291.

Since there was no action pending in state court when the district court stayed all proceedings in the instant case, the order is appealable.

Respondent cites Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955) for the proposition that the order is not appealable pursuant to 28 U.S.C. 1291. That case

involved litigation under the Arbitration Act and was decided on the basis of a unique and separate line of cases relating to arbitration which are not relevant to the instant case. See 9 MOORE, Supra at 110.20 (4.-1).

In addition Rodinger involved the refusal of the court to stay the action which did not put the appellants out of court. On the contrary, because the order in the instant case stayed all proceedings, the appellants were effectively out of court with no remedy but to appeal the order.

Respondent also cites to Thibodeaux v. Louisiana Power & Light Co., 255 F. 2d 774 (8th Cir. 1958). The decision of that court that the stay order was not appealable pursuant to 28 USC 1291 seems to be in error in view of the subsequent decisions by the U.S. Supreme Court in Idlewild and Turner. In addition, the court in Thibodeaux held that the order was appealable pursuant to 28 US. 1292.

It should be pointed out that the order in the instant case is also appealable pursuant to 28 US. 1292 (a)(1) since injunctive relief was sought in the district court action. See Idlewild, 289 F.2d 426, 428 (2d Cir. 1961) where the court stated:

Appellees' arguments that this order was not final and hence unappealable under 28 US. 1291, 1292 is not well taken.



II.

RESPONDENTS RELIANCE ON SPECTOR MOTOR SERVICE v. MC LAUGHLIN,
323 U.S. 101 (1944) IS INAPPOSITE TO THE INSTANT CASE

The Spector case cited by respondent basically restates the abstention doctrine. In citing it respondent assumed that the court relied on the abstention doctrine; this does not appear to be correct. No where in the order did the court refer to the abstention doctrine, to threshold state law questions which needed to be decided first by state court, or to any cases standing for the abstention doctrine.

It is clear, in any case, however, that abstention would not be proper in this case. As enumerated in Appellant's Brief, Congress intended that Indians be able to litigate their cases involving federal issues in a federal court, and that to require Indians to litigate in state courts would be a subversion of that Congressional intent. As stated in Great Lakes Inter-Tribal Council v. Vought, 309 F. Supp. 60, 64 (W.D. Wis. 1976):

To require exhaustion of state remedies or to abstain from the exercise of jurisdiction until the state has undertaken to clarify the applicability of its fish and games laws to plaintiff on Indian lands, would be to dilute the Congressional intention to provide to the Indians a federal forum for just such questions as those presented here.

Furthermore, the abstention doctrine is predicated on the existence of unclear threshold state law questions

which a state court should clarify and decide. In Spector there were such threshold state law questions. In the instant case, however, there are no threshold state law questions to be decided. All the questions raised in plaintiff's brief are federal questions; in fact, the threshold question of whether there is a reservation is a federal question.

In Board of Com'rs of Pawnee County, Okl. v. United States, 189 F. 2d 248 (10th Cir. 1943) state statutes were examined in light of a federal act regarding Indians and the U.S. Constitution. The Court stated at 251:

This suit involves the application and construction of a federal act, and the taxability of the land in question depends upon the construction and application to be given to that Act.

The Court then held that the issue did not have to be first tried in a state court, but that the federal court should take jurisdiction and decide the matter.

Similarly, in the instant case state statutes are to be examined in light of a federal act (Public Law 280; 67 Stat. 588 et. seq.) and a federal treaty (10 Stat. 1132). There are no threshold state law issues which need to be first decided by a state court.

The fact that respondent instituted an action subsequent to the instant case which may have raised some state law issues is completely irrelevant to the issues in the instant

case and cannot operate to deprive plaintiff its right to choose a federal forum.

As pointed out in Puyallup Tribe's Memorandum Regarding Abstention Doctrine (Transcript p. 122) the application of that doctrine to this case would be incorrect and in addition, bring absolutely no practical results. In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), the U.S. Supreme Court held that a plaintiff instituting an action in federal court cannot be forced into state court to litigate federal questions. If a party is required to go into state court to litigate state law questions, the party may reserve the right not to litigate the federal questions in that state court.

It would be difficult, if not impossible, to identify the threshold state law question which a state court would interpret in the instant case. The very first question to be decided is whether the land in question is Indian reservation land; this is clearly a federal question, Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962). All the other questions in the case relate to whether the federal land is immune from state jurisdiction by virtue of Public Law 280. There are no unclear state laws which need interpreting before the federal questions are decided. The state law is clear and the only question is whether the application of the state law to Indians is a violation of the federal constitution,

treaties and statutes. Therefore, to attempt to apply the abstention doctrine in the instant case would be both an impossibility and an error of law.

Just as the district court and this court in Agua Caliente Bend of Mission, Ind. v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) found it unnecessary to abstain and decided that case on its merits, this court should require the district court below to decide this case on its merits.

III.

RELEVANCE AND IMPORTANCE OF THE AGUA CALIENTE AND THE FULLER v. VOLK CASE

A. Respondent states (Br. 12, 13) that the trial court below refused to apply 28 U.S.C. 1341 and did not base its order on that statute; respondent then denies the application of Agua Caliente to this case. It is clear from the order that 1341 was of central importance. The court not only recited the statute verbatim in its order but its only case citations were two cases relying on 1341 or its rationale. Respondent has clearly failed to distinguish Agua Caliente from the instant case.

B. Respondent's final argument on p. 14 of its brief in which he relies on Fuller v. Volk, 351 F.2d 323 (10th Cir. 1965) is unclear. It seems to be contending that

intervenors may not raise any issues of jurisdictional claims which the original parties did not raise or possess. This is clearly erroneous. Intervening parties, once allowed to intervene, are essentially original parties. See Securities Comm'n v. U.S. Realty Co., 310 U.S. 434 (1940); Park & Tolford v. Schulte, 160 F.2d 984 (2d Cir. 1947); Rice v. Durham Water Co., 91 F3d. 433 (C.C.E.D.N.C. 1899).

Even assuming that if there is no jurisdiction for original parties, that an intervention will not be allowed to "breathe life" into a nonexistent law suit, that point of law would have no application to the instant case. Respondent sought to dismiss out the original parties and the court refused to do so. In addition, the court permitted the intervention of the Puyallup Tribe. There was and is no jurisdictional defect which the intervenor sought to cure. There was jurisdiction over the original parties. This is clear from the court's action.

Even if there was no jurisdiction over the original parties in the instant case, a court still has the power to treat the intervenor's pleading as a separate action. That clearly is the wisest route to follow in this case. As the court in Fuller stated at 379:

By allowing the suit to continue with respect to the intervening party, the court can avoid the


senseless 'delay and expense of a new suit, which at long last will merely bring the parties to the point where they are now.'

IV.

The allegations in the Appendix included in respondent's brief should not be considered by this Court because such appendix presents facts clearly outside the record, and is, in parts, argumentative. Appellant, therefore, will not respond to the allegations and misstatements in said Appendix.

Dated this 15th day of March, 1972.

Respectfully submitted,


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MAY

1972

No. 71-2604

United States Court of Appeals

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

VICTOR RYCKEBOSCH, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

FILED

MAY 22 1972

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply is addressed to certain matters raised by the Company in its brief.

1. Contrary to the Company's contention (Co. Br. p. 13), the Board's position in this case is not undercut by the Section of the interpretative bulletin issued by the Secretary of Labor entitled "Hatchery

employees working on farms.” 29 C.F.R. Sec. 780.181.¹ The truckdrivers, whose status as employees is at issue in the instant case can in no way accurately be classified as “[h]atchery employees working on farms,” since, as shown in our opening brief pp. 6-8, these truckdrivers are engaged exclusively in the hauling of live poultry from the farms of independent growers to market. They do no agricultural or hatchery work whatsoever. Their task is and has been functionally, geographically, and historically distinct from the rest of the Company’s operations, including its hatcheries. Thus, the instant coop truckdrivers, for ten years prior to 1969 when their employer was bought out by the Company, worked for an independent hauler who was hired by processing plants to bring poultry from the farms to the processing plants. Even after the Company’s purchase of the trucking operation, the truckdrivers continued to be dispatched by their former employer from his home, reported to work and weighed their loads at the same places, and performed generally as before. Moreover, there has been no interchange between the instant drivers and the Company’s other drivers who transport baby chicks from the hatcheries to the contract growers and who transport feed from the feed mill to the contract growers. Accordingly, although Section 780.181 does exempt hatchery employees who, in conjunction with their other duties, are engaged in “loading and transporting” poultry, that section has no application here because the instant truckdrivers simply are not hatchery employees. Rather, they are solely truckdrivers, who do no loading (main br. p. 7)

¹ §780.181, *Hatchery employees working on farms*, provides as follows:

The work of hatchery employees in connection with the maintenance of the quality of the poultry flock on farms is also part of the “raising” operations. This includes testing for disease, culling, weighing, cooping, loading, and transporting the culled birds. The catching and loading of broilers on farms by hatchery employees for transportation to market are exempt operations.

and whose work is done "on farms" only insofar as they pick up poultry on farm property. See, *N.L.R.B. v. Gass*, 377 F.2d 438, 444 (C.A. 1, 1967); *Wirtz v. Osceola Farms Company*, 372 F.2d 584, 588 (C.A. 6, 1967).

2. The Company's self-serving (Co. Br. p. 11) assertion that the Company bears the entire risk of loss, while the independent growers bear no risk of loss, is both misleading and erroneous. Although it is true that the Growers Agreement does provide that any losses will be borne by Ryckebosch, the undisputed record evidence shows that the Company pays the grower nothing for the birds that die from disease or for any other reason and also does not pay when birds are confiscated at the processor's plant by the United States Department of Agriculture (Main Br. p. 17). In addition, since the Company pays a grower nothing for the use of his land, labor, and equipment, if a significant number of birds die or are confiscated, then the Company's payments to the grower for birds that reach maturity will be less than the value of the land, labor, and equipment furnished by the grower. Therefore, contrary to the Company's contention, the contract growers assume a considerable risk of loss with a corresponding decrease in the Company's own risk — a factor which concededly motivated the Company in utilizing the independent contractor method of operation (main br. p. 4).

Furthermore, the risk of loss assumed by the contract growers in the instant case is far greater than the risk of loss assumed by the contract growers in *Wirtz v. Tysons Poultry, Inc.*, 355 F.2d 255 (C.A. 8, 1966) (distinguished in our opening brief pp. 22-23 and relied on by the Company in its brief pp. 9-10, 12, 16), whose hatcheries produced eggs which were then processed in Tyson's plant. In both *Tyson's Poultry* and the instant case, the growers furnished the land, labor, and equipment, but

in *Tyson's Poultry*, unlike the instant case, the growers were “. . . paid *therefor* at a scale completely unaffected by the market” (355 F.2d at 257) (emphasis added) in accordance with a contract between Tyson and the growers which provided that “[w]hen birds are housed, payment will begin on the basis of ½ cent per hen per week until 10% production is reached.” (355 F.2d at 256 n. 2). Thus, in *Tyson's Poultry*, the growers were compensated for the housing, labor, land, and equipment which they furnished on the basis of “½ cent per hen per week” regardless of whether any eggs were produced, whereas in the instant case, as shown *supra*, the growers were not directly compensated by the Company for the use of their land, labor, and equipment. Finally, the Company correctly states that the contract growers in *Tyson's Poultry* were not paid for broken eggs (355 F.2d at 257). However, it is obvious that the risk of loss from broken eggs is relatively insignificant compared to the ever present risk to the contract growers in the instant case that their entire flock of birds might be wiped out through disease.

CONCLUSION

For the reasons stated herein and in our opening brief, the Board respectfully urges that its order should be enforced.

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May, 1972

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IN THE

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BRIEF FOR VICTOR RYCKEBOSCH, INC.

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BRIEF FOR VICTOR RYCKEBOSCH, INC.

Statement of the Issues Presented.

1. Whether there is a reasonable basis in law and warrant in the record to support the Board's exercise of jurisdiction over Respondent's live haul poultry drivers.

2. In the event that the Board properly concluded that it had jurisdiction because the aforementioned poultry drivers were not exempt as agricultural employees, whether or not the employing industry remained substantially the same so that Respondent had the duty to bargain in good faith as a successor employer to Patterson Trucking Company.

Statement of Facts.

On the issue of whether or not the employees herein are exempt from the Act, as agricultural laborers, Respondent for the most part, accepts the General Counsel's statement of facts. Respondent, too, is "unable to

discern any significant factual distinction between the instant case and the Strain case” [R. 58]. *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (C.A. 5, 1969). Respondent also calls to the Court’s attention the following facts:

1. At all times Respondent has legal title to the poultry herein [G.C. Exh. 3].
2. Respondent bears the entire risk of loss [G.C. Exh. 3] and of market fluctuations [Tr. 420, 459].
3. Respondent decides when and if the poultry has achieved proper weight and state of health and is in marketable condition [Tr. 656]. It then dispatches appropriate transportation equipment to haul the poultry to the processing plant [Tr. 656].
4. The Board made no findings that Respondent’s trucking operations were disproportionate in size to its other farming operations [Tr. 402-403, Resp. Exh. 7].
5. Respondent competes with farmers in the Southeast United States [Tr. 675].
6. Modern poultry operations, such as Respondent’s, must be fully integrated¹ to meet the competition in the marketplace [Tr. 302].
7. Respondent’s fundamental operations have not changed in thirty-five years [Tr. 304] and it has been using growers to share in the raising of poultry since 1946 [Tr. 299, 300].
8. It has been Respondent’s good fortune to employ, for the most part, only conscientious growers [Tr. 358].

¹The term fully integrated as used herein refers to the ownership and management of all factors of the production process from beginning to end or appropriately here, from the cradle to the grave.

Respondent generally accepts the General Counsel's statement of facts on the issue of successorship. Respondent also calls to the Court's attention the following facts:

1. Patterson Trucking Company did not sell all of its equipment to Respondent at the "Bulk Sale" [Tr. 692].
2. Subsequent to June 1, 1969, Patterson operated the above equipment with some of his former drivers [Tr. 700] to haul live poultry [Tr. 513, 696], under his old California Public Utilities Commission license [Tr. 695].
3. In July or August 1969, the Union's Business Agent, John Grundy, demanded that Wesley Patterson negotiate a contract with the Union covering his continued operations [Tr. 714].
4. Respondent did not know that Patterson intended to remain in the live haul poultry business [Tr. 723].
5. Respondent had no knowledge of the expiration date of the Union contract [Tr. 443] nor was its existence even clearly apparent to it or considered by it at the time of the "Bulk Sale" [Tr. 445]. Consequently, the "Bulk Sale" of equipment was consummated without any bargaining over the value of Patterson's work force as a whole, because Patterson did not know which, if any, of his drivers Respondent intended to hire [Tr. 261].
6. The intermittent nature of Patterson's business made seniority vitally important to his employees [Tr. 196; 265; G.C. Exh. 11].
7. Respondent has a policy of offering its employees a full forty hour week of employment

[Tr. 215], and Ryckebosch promised the poultry drivers steadier work as an inducement to join Respondent [Tr. 233].

8. When Patterson's employees learned of the shrinkage of Patterson's business, they asked to have a meeting with Mr. Ryckebosch [Tr. 261-262], not Grundy. Grundy did not attend the meeting between Mr. Ryckebosch and the drivers [Tr. 263]; a majority of whom were not even members of the Union [Tr. 444, 262-263], despite a union shop clause in Patterson's contract with the Union [G.C. Exh. 11].
9. In April or May of 1969, Grundy knew that Patterson was selling his equipment to Respondent and that the Union's agreement with Patterson was due to expire May 31, 1969 [Tr. 492]; nevertheless, Grundy did not request that Respondent negotiate until after the contract had expired [G.C. Exh. 13].
10. Respondent's refusal to bargain collectively with the Union was solely based on its belief that the employees herein are engaged in agriculture and there is absolutely no hint or allegation that Respondent harbors any anti-union animus or that Respondent hired the drivers because of the presence or absence of union membership [Tr. 406].
11. The record is clear that the "Bulk Sale" was conducted at arms length and solely to insure uninterrupted transportation facilities for Respondent's poultry in view of Patterson's pending bankruptcy [Tr. 391-392].

ARGUMENT.

I.

The Board Lacks Jurisdiction Over Respondent Because Its Live Haul Poultry Drivers Are Exempt From the National Labor Relations Act as Agricultural Laborers.

Respondent will not burden this busy Court with a lengthy brief. The Board, through its Trial Examiner and the brief of the General Counsel, concede that this case has no significant factual distinctions from the 5th Circuit's decision in *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (C.A. 5, 1969). Respondent agrees with the Board on this point and urges that this Court, like the 5th Circuit, deny enforcement of the Board's order.

This Court is not bound by the Board's legal conclusion that it had jurisdiction over Respondent. Were this the usual National Labor Relations Act case, Respondent would have to overcome the Board's presumed expertise. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474. However, for twenty-five years Congress has annually decided that the Board is not expert enough to decide the scope of the agricultural exemption by making the Board's definition of the term "agriculture" synonymous with that of the Secretary of Labor (G.C. Brief, p. 13, n. 5). Until *Strain*, the Board had always bowed to the expertise of the Secretary of Labor. As recently as 1965, the Board said:

"On numerous occasions, the Board has stated that it was its policy to consider the interpretation of Section 3(f) by the Labor Department *in view of that agency's responsibility and experience in administering that section.*" (Emphasis added). *McAnally Enterprise, Inc.*, 152 N.L.R.B. No. 50, 59 LRRM 1118, 1119.

Obviously, a contrary rule would result in the anomalous and untenable situation of two federal administrative bodies interpreting the same statute with different results. For example, in *N.L.R.B. v. Kelly Brothers Nurseries*, 341 F.2d 433, 438 (C.A. 2, 1965), the Court agreed with the Board's contention that considerations of comity between two agencies of the government make it desirable that the view of Department of Labor be followed.

There is a second reason why the parties to the within case appear before this Court on equal footing. The Supreme Court has held that in cases where the Board's fundamental jurisdiction to act is at issue or where an issue of law is presented, the Board's own interpretation of the statute may be considered *de novo* by the reviewing Court, *Leedom v. Kyne*, 358 U.S. 184; *N.L.R.B. v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675.

This case is, therefore, governed by:

1. The agricultural definition contained in the Fair Labor Standards Act (FLSA) 29 U.S.C. Sec. 203(f).
2. The cases interpreting the agricultural exemption.
3. The *published* administrative rulings of the Secretary of Labor.

The Statute.

It is difficult to imagine how an exemption in a statute could be written in broader terms. Section 3(f) of the FLSA provides in pertinent part:

“Agriculture includes farming in all its branches and among other things includes the . . . raising of . . . poultry, and any practices . . .

performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery . . . to market or to carriers for transportation to market.”

As the United States Supreme Court said in *Maneja v. Waialua Agricultural Company*, 349 U.S. 254, 260:

“From the very beginning of the legislative consideration of the Act, a comprehensive exemption of agricultural labor was a primary consideration of Congress. Nevertheless, before its final language developed, the agriculture exemption ran the gamut of extensive debates and amendments, each of the latter invariably broadening its scope. . . . Although this language was described by those in charge of the bill in the Senate as ‘perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal,’ 81 Cong. Rec. 7648, its coverage was broadened until it became coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and their ‘preparation for market, delivery to storage or to market or to carriers for transportation to market.’ ”

The Cases.

Respondent submits that no Court has ever held or even articulated any dictum to support the Board’s “cutoff” theory.² Indeed, we have a recent holding

²The Board’s cutoff theory concedes that Respondent by hatching and breeding its own birds is engaged in agriculture. But, so the theory goes, if Respondent places his birds in the temporary care of a grower, the agricultural exemption is *per se* cut off. Thus, subsequent activities of the farmer, which would normally be well within the secondary meaning of the definition of agriculture as “delivery to market” or to carriers for transportation for market become non-exempt.

with “no significant factual distinctions” from a sister jurisdiction repudiating the Board’s “cutoff” theory; viz., *Strain, supra*. The Court’s well-reasoned opinion in *Strain* specifically held that integrated agricultural operations, such as Respondent’s herein, are within *both* the primary and secondary meanings of the agricultural exemption as first articulated in *Farmers Reservoir & Irrigation Co. v. McComb*, 377 U.S. 755, 762-763 (1949). In *Strain, supra* the Fifth Circuit said at page 1032:

“Taken together, these cases would seem to establish that *Strain* is engaged in farming as that term is used in the primary definition of Section 3(f). The fact that *Strain* hired the independent growers to raise its birds and contract loaders to catch the birds for loading on to its trucks, would not seem to destroy its claim to having raised the poultry. Furthermore, the trucking activities were a part of *Strain*’s poultry raising venture. They were performed incident to or in conjunction with *Strain*’s poultry raising operations and *Strain* was not a poultry raiser conducting a trucking operation on the side.”

The General Counsel’s brief is critical of the Fifth Circuit’s holding in *Strain* because of that Court’s reliance, in part, on the fact that the trucking operation there was not inordinate in size, investment or time in relation to the rest of *Strain*’s operations. Yet, the Board itself has used this test in the recent past. For example, in *McAnally, supra*, the Board said at 59 LRRM, 1119:

“With respect to other factors that the Board often examines to determine whether workers in analogous situations are employees or agricultural

laborers, we note that the employer's investment in buildings and equipment in his egg processing plant appears to be much less than his overall investment in his farming operations, and not great in absolute terms."

Respondent's sole business purpose is the raising of poultry from the cradle to the grave. If the birds truly were those of the grower one would expect the grower to pay Respondent for the hauling. The hauling operations are just one step in Respondent's fully integrated enterprise.

The Board's cutoff theory is also contrary to the Eighth Circuit's holding in *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (1966). In *Tyson's* the Department of Labor sought to apply the FLSA to certain employees at the employer's egg assembly plant. It was stipulated that 27% of the eggs were obtained from three independent growers pursuant to a contract between Tyson's and the growers. In affirming the District Court, the Eighth Circuit dismissed the Secretary's contention that because the eggs processed were produced by independent growers the agriculture exemption was cut off with the following comment at page 258:

"We are here concerned with a single and completely integrated farming operation carried on and headed up by appellees [the employer] through their affiliated corporation, Poultry Growers, Inc. As found by the District Court, the appellees are farmers and are the ones who initiated the farming operations here involved. Without appellees the independent growers arguably would never have undertaken the initial and continuing cost of acquiring the birds and producing the eggs.

The contract growers merely aid the appellees, who the District Court found to be the ones qualified to claim the agricultural exemption under the Act as to their employees engaged in the 'handling, cooling, grading, candling and packing' of eggs" (Emphasis added).

In his seemingly desperate attempt to distinguish *Tyson's*, the General Counsel omits mention of the fact that *Tyson's* growers, like Respondent's, were paid on a production incentive basis and Respondent, like *Tyson's*, bears the risk of price fluctuations in the marketplace. Respondent does not pay for dead or damaged birds and *Tyson's* did not pay for broken eggs, *id.* at 257. Contrary to the General Counsel's argument, the grower herein makes only routine day-to-day decisions. All important decisions are made by Respondent. Thus, Respondent decides on the size and quality of the flock, the composition of the feed mixture, the medicines required and standards of care and facilities the grower must furnish. Importantly, Respondent decides if and when the birds have achieved proper weight, health and marketability.

Moreover, this latter argument ignores the economic realities inherent in grower arrangements; namely, the total dependence of the grower upon Respondent. As the Court in *Tyson's* observed, but for Respondent, the growers might not be engaged in agriculture at all.

In support of its new and novel "cutoff" theory the Board relies heavily upon three cases; viz., *N.L.R.B. v. Olaa Sugar Company*, 242 F.2d 714 (C.A. 9, 1957); *Waldo Rohnert Co. v. N.L.R.B.*, 322 F.2d 46 (C.A. 9, 1963); and *Mitchell v. Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286 (C.A. 5, 1959). An analysis of

these cases reveals that the Board has failed to distinguish between grower agreements where the employer is a purchaser and grower agreements where the employer retains title to the agricultural produce and bears the entire risk of loss. Stated another way: *Whose produce is it?*

For example, this Court in *Olaa Sugar, supra*, held that where the grower agreement provided for the purchase of sugar cane from independent growers, the employees transporting the sugar cane were not exempt as agricultural laborers. Likewise, this Court in *Rohnert, supra*, found that the owner of a seed mill processing plant was engaged in a commercial as opposed to agricultural operation. This, the Court pointed out, resulted from the fact that while the grower agreement, as a matter of form *purported* to retain title in the mill operator, *the growers were required to pay the mill operator for the seed irrespective of whether or not a crop was actually produced*. In other words, in *substance*, they were purchasers of the seed. *It was their produce*. Here, the grower agreement unequivocally provides that: ALL LOSSES WILL BE BORNE BY RYCKEBOSCH [G.C. Exh. 3, Emphasis added]. The grower stands no risk of loss on the agricultural produce—the birds. In fact, he is guaranteed one cent per pound for each bird reaching maturity [Tr. 430]. At no time are the birds ever purchased by the grower nor, by contrast to *Rohnert*, is there even the slightest hint that Respondent's grower agreement is a sham—a purchase agreement in disguise.

Moreover, the Board's position herein appears to be inconsistent with its own decisions in *Rohnert* as affirmed by this Court. From the published opinions of the Board, it is clear that Rohnert's drivers transported

all of the seed to Rohnert's mill. 136 N.L.R.B. 89, 90. It also appears that of this group of drivers only those who regularly spent their time at the seed mill were included in the bargaining unit. 120 N.L.R.B. 154 n. 8. *The Board clearly excluded all farm truck drivers as agricultural laborers*, 136 N.L.R.B. 89, 93.

Mitchell v. Huntsville, *supra*, like the *Rohnert* case, involved the purchase by a farmer of agricultural commodities from independent growers. This case was exhaustively analyzed by both the Eighth Circuit in *Tyson's* and the Fifth Circuit in *Strain*. Both Courts distinguished the *Mitchell* case on precisely the same grounds Respondent has urged herein; namely, that the agricultural exemption does not apply when a farmer (or anyone else for that matter; *Chapman v. Durkin*, 214 F.2d 360 (C.A. 5, 1954)) purchases agricultural commodities from independent growers. The record is clear that the Respondent does not purchase the poultry from the growers herein and that it is *its* poultry from the cradle to the grave.

Published Interpretative Bulletins of the Secretary of Labor.

The Board concedes that Congress has tied its hands by limiting the definition of agricultural laborers to that found in the FLSA (G.C. Brief, p. 13, n. 5); *N.L.R.B. v. Kelly Brothers Nurseries, Inc.* (*supra*).

The Supplemental Appendix to the Board's Brief quotes from certain of the Secretary of Labor's Interpretative Bulletins (Title 29, Part 780, Code of Federal Regulations). Section 780.135 thereof is obviously inapplicable for the dual reasons that Respondent herein is clearly not a feed dealer or processor and because the section is not at all referable to the grower situation. Further, this section holds only that commercial feed dealers are not farmers within the *primary* mean-

ing of the definition of agriculture". Section 780.169 refers to the "purchaser" situation found by this Court to be nonexempt activity in *Olaa Sugar, supra*. Section 780.169 provides merely that where a farmer hires an independent hauling contractor, such as Patterson Trucking Company, the employees of such public carrier are nonexempt. Section 780.172 refers to the situation so well-described by the Supreme Court in *Maneja v. Waialua, supra*, which holds that the exemption is lost if the farmer transports *someone else's produce*. Section 780.173 is helpful to the Court only insofar as subdivision (c) sums up the principles already articulated in the foregoing discussion of *Mitchell v. Huntsville Nurseries, supra*, and *Olaa Sugar Co., supra*.

Surprisingly, not cited by the Board are sections 780.180 and 780.181 which are contrary to the Board's cutoff theory. Section 780.181 holds that the mere employment of contract growers by a hatchery does not cutoff the agricultural exemption. Section 780.181 goes on to hold that employees of a hatchery who load and transport poultry are engaged in the raising of poultry.

The foregoing discussion relates to the official determinations of the Secretary of Labor as published in the Federal Register. In passing, it should be noted that the Board has received no *ex parte*, "administrative advice" in this case nor in *Strain, supra*. The General Counsel's comments concerning such should therefore be ignored.

³Section 780.137 provides as follows: "The discussion in sections 780.114-780.136 relates to the direct farming operations which come within the 'primary' meaning of the definition of agriculture."

II.

**Respondent Was Not the Successor to
Patterson Trucking Company.**

The usual test of whether or not an employer is a successor is whether the employing industry has remained the same so as to justify an assumption that the employees involved continue to desire union representation. *N.L.R.B. v. Alamo White Truck Service*, 273 F.2d 238, 240 (C.A. 5, 1959). The employing industry of Wesley Patterson was that of a contract or public carrier. As such, he was regulated by the California Public Utilities Commission. His primary activities were the transportation of live haul poultry upon request from processing plants. The processing plants purchased the live poultry from farmers, such as Respondent herein. As the largest poultry farmer in the Antelope Valley, it is not surprising that nearly 80% of Patterson's business with the processing plants involved the pick up of Respondent's live poultry.

Patterson, facing bankruptcy, found that he could only extricate himself from his predicament by selling off nearly all of this equipment. He sold it to Respondent and terminated the employment of nearly all of his drivers. If the drivers were so inclined, they could have awaited recall by Patterson, or, exercising their seniority rights under the labor contract, claimed whatever work Patterson was able to secure for his one remaining truck. This is the clear import of Business Agent Grundy's demand that Patterson negotiate a contract with the Union covering his continued operations. In-

stead, these men recognizing their specialized skills, solicited employment with Respondent who, as the employees knew, was in an entirely different employing industry; viz., agriculture as opposed to public hauling.

The General Counsel stresses that the employees herein perform for the most part the same functions they performed under Patterson. But this is not the test of *employing industry*. As the Court, Burger Circuit Justice, pointed out in *IAM v. N.L.R.B.* (Lou Ehlers Cadillac), 414 F.2d 1135 (C.A. D.C. 1969) certiorari denied, the Court must look to the *business objectives* of the alleged successor to determine this issue. As a public carrier, Patterson was subject to the whims of the marketplace and was, therefore, unable to offer his employees steady employment. This explains why the only question the drivers posed to Ryckebosch relative to the Union pertained to their seniority, and why Patterson's labor contract was very specific on the allocation of available work [G.C. Exh. 11]. Respondent on the other hand is able to offer its employees full employment and promotional opportunities.

Patterson also had to make a profit on his trucking operations or fail. Whereas, as part of Respondent's integrated agricultural operations, the live haul trucking operations need not show a profit. Also, the management hierarchy under which the employees operate is entirely different. The employees are no longer subject to Wesley Patterson's own notions of compensation, employee discipline and hiring practices. Patterson must

now use wage rates, insurance and profit sharing plans, employment applications and other personnel policies established at the corporate level. Patterson has assumed a new and subordinate role of first level supervisor in Respondent's management term.

The General Counsel also lays great stress on the fact that all seven of Patterson's employees were employed by Respondent. But this alone is not the controlling factor in determining successorship, *id.* at 1138.

As this Court pointed out in *N.L.R.B. v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833, 836 (1964), the confusion in the successorship cases is due to the fact that most cases arise under circumstances suggesting a lack of good faith. It is undisputed that Respondent employed the drivers herein because of their ability and not because of the presence or absence of Union membership.

Summary and Conclusions.

The Board lacks jurisdiction over Respondent because its entire enterprise is squarely within the agricultural exemption. Respondent has only one business objective—the raising of poultry for market. Its transportation function is only one small part of its integrated farming operations. The Board's cut off theory has been repudiated in two sister circuits; viz., the Fifth in *Strain* and the Eight in *Tyson's*. Yet, strangely, the Board offers no explanation for its new policy or why Respondent should be covered by the Acts while its *competitors* in those circuits are not.

Respondent's good faith in purchasing Patterson's equipment is not questioned by the Board. The drastic change in management and business objectives of

Respondent clearly demonstrate that the employing industry is not the same.

Respondent submits that the Board's order herein has no reasonable basis in law nor warrant in the record to support it. Therefore, enforcement should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

Title 29, Part 780, Code of Federal Regulations.

§780.180 Contract production of hatching eggs.

It is common practice for hatcherymen to enter into arrangements with farmer poultry raisers for the production of hatching eggs which the hatchery agrees to buy. Ordinarily, the farmer furnishes the facilities, feed and labor and the hatchery furnishes the basic stock of poultry. The farmer undertakes a specialized program of care and improvement of the flock in cooperation with the hatchery. The hatchery may at times have a surplus of eggs, including those suitable for hatching and culled eggs which it sells. Activities such as grading and packing performed by the hatchery employees in connection with the disposal of these eggs, are an incident to the breeding of poultry by the hatchery and are exempt.

§780.181 Hatchery employees working on farms.

The work of hatchery employees in connection with the maintenance of the quality of the poultry flock on farms is also part of the "raising" operations. This includes testing for disease, culling, weighing, cooping, loading, and transporting the culled birds. The catching and loading of broilers on farms by hatchery employees for transportation to market are exempt operations.

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

VICTOR RYCKEBOSCH, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Burns, Wm. J., Int'l Detective Agency, Inc. v. N.L.R.B., 441 F.2d 911 (C.A. 2, 1971), cert. granted, 78 LRRM 2463 (1971)	11
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Chemical Workers v. Pittsburgh Plate Glass Co., ____ U.S. ____ (1971), 78 LRRM 2974 (1971)	13
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Lindstrom Hatchery & Poultry Farm, 49 NLRB 776 (1943)	16

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N.L.R.B. v. Colten, 205 F.2d 179 (C.A. 6, 1939)	10
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N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944)	13, 23
N.L.R.B. v. Interstate 65 Corp., F.2d _____, (C.A. 6, 1971), 79 LRRM 2122	10
N.L.R.B. v. Katz, 369 U.S. 736 (1962)	12
N.L.R.B. v. Lunder Shoe Corp., 211 F.2d 284 (C.A. 1, 1954)	10
N.L.R.B. v. Miller Brewing Co., 408 F.2d 12 (C.A. 9, 1969)	12

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N.L.R.B. v. Zayre Corp., 424 F.2d 1159 (C.A. 5, 1970)	10
Overnite Transp. Co. v. N.L.R.B., 372 F.2d 765 (C.A. 4, 1967), cert. den., 389 U.S. 838	10
Phillips v. Walling, 324 U.S. 490 (1945)	20
Sweetlake Land & Oil Co. v. N.L.R.B., 334 F.2d 220 (C.A. 5, 1964), cert. den., 380 U.S. 911	15
Teamsters Local 524 v. Billington, 402 F.2d 510 (C.A. 9, 1968)	10
Wackenhut Corp. v. Int'l Un., United Plant Guard Wkrs., 332 F.2d 954 (C.A. 9, 1964)	10
Waldo Rohnert Co. v. N.L.R.B., 322 F.2d 46 (C.A. 9, 1963)	15, 18, 22, 23
Wirtz v. Osceola Farms Co., 372 F.2d 584 (C.A. 5, 1967)	15
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 Statutes:	
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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 71-2604

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

VICTOR RYCKEBOSCH, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company was a successor employer of truck drivers engaged in hauling live poultry owned by the Company but hauled from farms of contract growers to processing plants and therefore violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by unilaterally instituting changes in wages and working conditions.

2. Whether the Board properly found that such truck drivers are “employees” and not “agricultural laborers” within the meaning of Section 2(3) of the Act.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), for enforcement of its order against respondent Victor Ryckebosch, Inc. (hereinafter the “Company”), issued on March 18, 1971. The Board’s Decision and Order are reported at 189 NLRB No. 8 (R. 79-81).¹

I. THE BOARD’S FINDINGS OF FACT

Briefly, the Board found that the Company succeeded to the bargaining obligation of an employer whose truckdrivers were represented by the Union,² that these drivers were “employees” and not “agricultural laborers” within the meaning of the Act, and that therefore the Company’s refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.

¹ “R.” references are to the pleadings, the decision and order of the Board, and other papers in the proceedings reproduced as Volume I, Pleadings. References to the stenographic transcript reproduced and filed with the Court are designated “Tr.” References designated “G.C. Exh.” and “Resp. Exh.” are to the General Counsel’s and the Company’s exhibits, respectively. References preceding a semicolon are to the Board’s findings; those following it are to the supporting evidence.

² General Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

A. The Company's operations

The Company's president and general manager is Victor Rykebosch who started raising turkeys in 1930 on a small parcel of land with an initial stake of one male turkey and eight female turkeys (R. 44; Tr. 33, 296). Today, he and his family control not only the Company, but also a corporate cooperative known as the Antelope Valley Turkey Growers Association, a turkey processor which slaughters and dresses turkeys, and another corporation known as Rykebosch & Sons which owns and operates a feed and grain mill at Lancaster producing poultry feeds for the exclusive consumption of poultry grown on the farms of growers with whom the Company has contracts. The Company itself owns and operates two chicken hatcheries at Lancaster and a turkey hatchery at Hemet, California. The Rykebosch family owns three neighboring 80-acre parcels of farm land at Lancaster, where alfalfa is raised and on which are situated the family home, the Company headquarters, and two of the chicken hatcheries. (R. 44; Tr. 300-318, 331-333, 336-337, 353-354; Resp. Exh. 7, 8).

The Company procures its chicken-hatching eggs from breeder farms. (R. 45; Tr. 34-36, 40, 343). The fertile eggs are transported to the Company's chicken hatcheries at Lancaster, where they are hatched into baby chicks. (R. 45; Tr. 36, 40). When the chicks are one day old, they are debeaked at the hatchery to prevent cannibalism (R. 48; Tr. 585-587), placed in boxes, and transported to one of the 188 turkey or chicken growers with whom the Corporation has contracts. (R. 45; Tr. 51-52). The growers are spread out throughout the southern half of California and they raise and care for the poultry until it is ready for marketing (R. 45; Tr. 53-57).

B. The Company's relationship to its contract growers

Some of the contract growers own their own farms; others lease them (R. 46; Tr. 51-53). Their capital investment in and poultry raising equipment is substantial. For example, contract grower Herbert Shipp has a 10-acre farm with a capacity for 80,000 fryer chickens which he values at \$75,000 (R. 46; Tr. 564-565). Another example is the 40 acre poultry farm of contract grower Robert Sherwood which he values at \$180,000. Sherwood has plans to invest an additional \$45,000 to increase the capacity of his farm from an annual output of 250,000 to 500,000 birds (R. 46; Tr. 536). The Company utilizes contract growers to minimize the threat of disease, which can destroy an entire flock, by splitting the birds up and spreading them over a number of farms; and also to limit the size of the Company's capital investment (R. 45-46; Tr. 334-335).

Under the terms of the contract the Company enters into with each grower, the grower agrees to raise the Company's birds, to furnish at his own expense the necessary land, poultry buildings and growing yards, field storage facilities, and other necessary equipment such as feeders, water founts, shades, roots, fencing and brooders, to provide at his own expense an adequate supply of water and electricity for the birds, to supply adequate labor to carry out all poultry raising operations as well as to assist in the loading of birds on trucks going to the processor and in unloading feed delivered to the grower, to provide adequate sanitation and general care of the birds and health under efficient growing practices, to give maximum protection to the birds against the hazards of fire, theft, predatory animals and sickness, to follow the Company's recommendations with respect to growing methods and marketing decisions, and to supply adequate compensation insurance for all its employees (R. 46-47; G.C. Exh. 3). The grower's status *vis a vis* the Company is described in Section 5 of the General Provisions of the agreement as follows:

[The] Grower under this agreement is an independent contractor and is not a partner, agent, servant, joint venturer, assistant, or employee of Ryckebosch . . . (Tr. 47; G.C. Exh. 3)

The Company retains legal title over the birds it supplies to the growers and also furnishes feed and medicine (R. 47; G.C. Exh. 3, Tr. 360, 366-367, 531-532). As the agreement permits onsite inspection, the Company has 5 field representatives, who, in addition to their other duties, call upon each of the 188 growers once a week or even more often when required by special problems arising in connection with the welfare of the flocks (R. 47-48; Resp. Exh. 8, Tr. 577-578).

The contract growers must exercise continuous care day and night in order to raise poultry properly (R. 46; Tr. 532). The growers must pay constant attention to insure that the amount of heating and ventilation is proper, that the automatic feeding and watering equipment is in good repair, that the litter in which the birds are bedded down is clean, that the birds have adequate and clean water and feed, and generally to insure "that the birds are made comfortable at all times" (R. 46; Tr. 532-533). In addition, the growers guard against predatory animals and also against disease in individual birds, which may result in the destruction of the entire flock (R. 46; Tr. 534-535, 548). When disease occurs, the grower, with the advice of a Company field representative, administers the proper medication to the birds, and when indicated, sends diseased birds to the State of California Veterinary Laboratory at San Gabriel, California, for treatment and advice (R. 46; Tr. 534). The Company pays the grower nothing for birds that die before they reach maturity or for birds that are confiscated at the processor's plant by the United States Department of Agriculture. The Company does absorb the cost of the items it furnished such as the baby chickens, feed, and medicine (Tr. 424-431, 456, 540-544, G.C. Exh. 3).

The Company determines when the birds are marketable and makes arrangements for the birds to be transported to the processing plants in Los Angeles and Lancaster (R. 47-48; Tr. 577-578, 655-656). The Company also makes a final accounting showing the sales price, the costs incurred, and the profit or loss (R. 47; G.C. Exh. 3). The Company agrees to pay the grower a minimum of 1 cent per pound to a maximum 1 to 2½ cents per pound for all chickens marketed, with the precise amount dependent on how a particular growers costs compare with those of the growers as a whole (R. 47; G.C. Exh. 3-8, Tr. 424-427). The Company also retains the right to terminate the agreement with any grower who neglects the birds, but in practice it has rarely done this (R. 47; G.C. Exh. 3, Tr. 582-583).

C. The marketing function; the Company's successorship to the Patterson Trucking Company's bargaining obligation and the Company's refusal to bargain with the Union.

Prior to 1959, the Company had hauled the live poultry for the growers to the processing plants with its own equipment. In 1959, the Company transferred the poultry hauling equipment to the Patterson Trucking Company (hereafter Patterson) and Patterson for some 9 years undertook the hauling operations from the growers' farms to market. (R. 48-49; Tr. 146, 167-173).³ Patterson was a contract carrier under license by the California Public Utilities Commission. Its customers were primarily poultry processing plants in the Los Angeles and Lancaster area who, when

³ The Company had also advanced \$80,000 to Patterson and received 4,535 shares of Patterson capital stock (R. 48; Tr. 168-123). However, the Company did not participate in the operation of Patterson as it was understood between Victor Ryckebosch and Lesley Patterson, Patterson's president, that the stock was held by the Company only as security for the loan (R. 48; Tr. 221-222).

poultry became of marketable age, engaged Patterson to pick up the poultry at the farm and deliver it to the processing plant which paid the freight (R. 48; Tr. 150-165). Eighty percent of its business was with the Company (R. 50; Tr. 145, 152, 163-164).

In 1968, Patterson began experiencing financial difficulties and was threatened with bankruptcy (R. 48; Tr. 174-175). On March 6, 1969, by means of a bulk sale, the Company purchased Patterson's truck hauling equipment, which consisted of seven diesel tractors and seven coop trailers (R. 49; Tr. 106-109, 145-146, 258-269, 391-394). The Company took possession of the equipment on June 1, 1969, and has since used it exclusively to haul the grown birds from the farms of its contract growers to the processing plants (R. 48; Tr. 107-110).

On June 1, 1969, all seven of Patterson's truck drivers went to work hauling live poultry for the Company (R. 49; Tr. 132-133). As before, they are supervised by Patterson's former president, Wesley Patterson, who was hired by the Company to become the supervisor of the live poultry drivers and who continued his practice of dispatching the truck drivers from his home (R. 49; Tr. 126-127, 147). Although the Company has acquired certain other hauling equipment from sources other than Patterson, the truck drivers generally drive the same vehicles that they had driven for Patterson (R. 49; Tr. 206-208, 489-490). Moreover, the truck drivers perform substantially the same duties as before. Thus, just as before the sale, a truck driver still weighs in his empty coop trailer, then drives to the designated contract grower's farm where the catcher's load the poultry into the coops on the truck. Then having weighed in again with a full load the driver delivers the load to the designated processing plant (R. 49; Tr. 141-143, 195-197, 468-480).

The seven live haul coop drivers formerly employed by Patterson remain, as before, a clearly identifiable homogeneous group. (R. 50; Tr. 143). There is no interchange between them and other truckdrivers employed by the Company (R. 50; Tr. 62, 71-72, 143). It has been stipulated that these other truckdrivers who transport feed to the hatcheries and chicks and poults to the growers are not involved in this proceeding (Tr. 62, 71-72).

At the time that the Company purchased Patterson's truck-hauling equipment in March, 1969, there existed a collective-bargaining agreement between the Union and Patterson, covering a unit of truckdrivers, which, by its terms, was due to expire May 31, 1969 (R. 60; G.C. Exh. 11 at p. 9). When the Union sought to reopen the contract in April or May, 1969, Union Representative Grundy sought to contact Rykebosch on several occasions to request bargaining, but without success (R. 60; Tr. 493-495). When President Rykebosch agreed to hire the seven Patterson's drivers, he told them that the Company had no obligation to deal with the Union since the Company's operations were in agriculture and therefore exempt from any duty of having to recognize or bargain with the Union (R. 49; Tr. 230-233, 263-266, 404-407).

The Company informed the Union in August, 1969, that it was refusing to recognize or bargain with it because the truckdrivers formerly in the employ of Patterson Trucking Company had, by their employment with the Company, become agricultural employees excluded from the coverage of the National Labor Relations Act (R. 60; G.C. Exh. 15). Without consulting the Union, the Company increased the pay of the drivers from \$2.75 to \$3 per hour and provided its own insurance program rather than the program set forth in the collective-bargaining agreement (R. 60; Tr. 135, 212).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company succeeded to the bargaining obligation of Patterson with respect to the coop or live haul poultry truckdrivers, that the truckdrivers were "employees" and not "agricultural laborers" within the meaning of Section 2(3) of the Act, and finally, that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union which represented those employees and by effecting unilateral changes in the employees' working conditions without consulting the Union.

The Board's order directs the Company to cease and desist from the unfair labor practices found and, from any like or related manner, interfering with the employees' rights under the Act. Affirmatively, the Board ordered the Company, upon request, to bargain collectively with the Union and to post appropriate notices.

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY WAS A SUCCESSOR AND THAT IT THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION, AND BY SUBSEQUENTLY EFFECTING UNILATERAL CHANGES IN ITS EMPLOYEES' WORKING CONDITIONS.

As shown in the Statement, when the Company took over Patterson's driving operations, the Patterson employees were represented by the Union and were covered by a collective bargaining agreement. We show below that the Board properly found that the Company was Patterson's successor and, as such, was bound to bargain with the Union as representative of the unit employees.

It is well settled that the essential predicate to the finding of a successorship is the subsidiary finding that the "employing industry" continues. This employing-industry concept rests on a rationale early stated by the Sixth Circuit in *N.L.R.B. v. Colten, et al.*, 105 F.2d 179, 183 (1939):

It is the employing industry that it sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . . It needs no demonstration that the strike which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.

If the transfer of operations and employees from one employer to another leaves substantially intact the identity of the employing enterprise, then the duty of the original employer to recognize and bargain with an incumbent union devolves upon the new employer as a "successor employer." *N.L.R.B. v. Auto Ventshade, Inc.*, 276 F.2d 303, 304 (C.A. 5, 1960). See also, *Teamsters Local 524 v. Billington*, 402 F.2d 510, 512-513 (C.A. 9, 1968); *Wackenhut Corp. v. International Union, United Plant Guard Workers*, 332 F.2d 954, 958 (C.A. 9, 1964); *N.L.R.B. v. Zayre Corp.*, 424 F.2d 1159, 1162-1164 (C.A. 5, 1970); *Overnite Transportation Co. v. N.L.R.B.*, 372 F.2d 765, 768 (C.A. 4, 1967), cert. denied, 389 U.S. 838; *N.L.R.B. v. Lunder Shoe Corp.*, 211 F.2d 284, 286 (C.A. 1, 1954); *N.L.R.B. v. Interstate 65 Corp.*, ___ F.2d ___, 79 LRRM 2122, 2124-26 (C.A. 6, decided, December 30, 1971).

Whether the "employing industry" remains substantially the same is determined by such criteria as whether (1) substantially the same business operations are being continued; (2) the same plant is used; (3) the same or substantially the same work force is employed; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment, and methods of production are used;

and (7) the same product is manufactured or the same services offered. See, e.g., cases cited *supra*; see also, *Maintenance, Inc.*, 148 NLRB 1299, 1299-1303 (1964). Not all of the criteria need be present to warrant a finding of continuation of the employing industry. The finding is based on a totality of the circumstances, of which whether the alleged successor took over a substantial part of the alleged predecessor's work force is perhaps the most important. *Maintenance, Inc.*, *supra*, 148 NLRB at 1302-1303; *William J. Burns International Detective Agency v. N.L.R.B.*, 441 F.2d 911, 915, 916 (C.A. 2, 1971) certiorari granted, 78 LRRM 2463 (October 12, 1971).

In the instant case, the Company took over the operations of Patterson, an independent trucking firm which since 1959 had hauled the Company's poultry from the farms of contract growers to processing plants. Patterson's drivers were represented by the Union. The factors pointing to continuity in the employing enterprise are more than sufficient to support the Board's finding that the Company succeeded to Patterson's bargaining obligation. The Company purchased Patterson's truck hauling equipment;⁴ it retained without any break in their employment, all seven of the Patterson drivers (R. 49; Tr. 8; 132-133). The Company placed them under the supervision of their old boss, Wesley Patterson, whom the Company hired as a supervisor (R. 49; Tr. 126-127, 147). The drivers perform essentially the same duties as before the sale (R. 49-50; Tr. 126-127, 153, 468-480). Thus, the truckdriver still weighs in his empty coop trailer,

⁴ Wesley Patterson did not transfer to the Company one flatbed trailer which he owned personally, and the Company now claims that he is using this trailer as part of a revived poultry operation (R. 49, n. 6; Tr. 720). Assuming the Company's claim to be true, it does not obviate the Company's bargaining obligation, because the Board found that the coop truck drivers constituted an appropriate unit and, have determined that the employing industry remained the same, the Board's finding is limited to that part of the operation taken over by the Company. (See main text *infra*).

then proceeds to the grower's farm where poultry is loaded into his truck, and then, having weighed in again with a full load, the driver delivers the load to the designated processing plant (R. 49; Tr. 143, 468-480). There is no interchange of Patterson's former truck drivers with the Company's other truck drivers who transport baby chicks from the hatcheries to the contract growers and who transport feed from the feed mill to the contract growers (R. 50; Tr. 62, 71-72). Moreover the continuity of Patterson's essentially hauling operations is not interrupted by the fact the Company hauls without a Public Utility permit. For though a permit holder, 80 percent of Patterson's hauls were for the Company.

We submit that the Board was inexorably led to the conclusion that the employing industry had remained the same, despite the change in ownership. The same coop truck drivers, under the same supervision, continued in the same manner to perform the same task, as before, namely the hauling of live poultry from the growers' farms to the processing plants (R. 50; Tr. 148, 152, 163-164, 190-192). In these circumstances the Board properly found that the Company was Patterson's successor for the purposes of collective bargaining.

As shown in the Statement, after it took over Patterson, the Company refused to bargain with the Union and instituted unilateral changes in wages and other conditions of employment without consulting the Union. Since the Company succeeded to Patterson's bargaining obligation and since, as we show in part II of this Argument, the truckdrivers remained employees under the Act, the Company conduct violated Section 8(a)(5) and (1) of the Act. See, in addition to cases cited *supra*, concerning the duty to bargain as a successor, the following concerning unilateral changes, *N.L.R.B. v. Katz*, 369 U.S. 736, 747 (1962); *N.L.R.B. v. Harrah's Club*, 403 F.2d 865, 874 (C.A. 9, 1968); *N.L.R.B. v. Miller Brewing Co.*, 408 F.2d 12, 15-16 (C.A. 9, 1969).

II. THE BOARD PROPERLY FOUND THAT THE COMPANY'S COOP OR LIVE HAUL TRUCKDRIVERS ARE "EMPLOYEES" WITHIN THE MEANING OF THE ACT AND NOT EXEMPT AS "AGRICULTURAL LABORERS"

As indicated, the Company took over the trucking operations of Patterson who had hauled live poultry from the farms of independent growers to market. The Company asserts that the truckdrivers performing this function are exempt since they are now agricultural laborers and not employees under the Act. The Board found, however, that "inasmuch as the coop truckdrivers . . . deliver the results," not of their own employer's farming but "of someone else's farming," (R. 59) they are covered by the Act. The task of determining the contours of the term "employee" has been assigned primarily to the agency created by Congress to administer the Act and the Board's determination is to be accepted if it has "'warrant in the record' and a reasonable basis in law." *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 130, 131 (1944); *Chemical Workers v. Pittsburgh Plate Glass Co.*, ___ U.S. ___, 78 LRRM 2974, 2977 (decided December 6, 1971). As we show below, the Board's determination here is amply supported by the record and has a reasonable basis in law.

The Congressional standard for determining whether employees are agricultural laborers is set forth in Section 3(f) of the Fair Labor Standards Act (29 U.S.C. Sec. 203(f), hereafter FLSA).⁵ As the Supreme

⁵ Section 2(3) of the National Labor Relations Act provides that the term "employee" shall exclude "any individual who is employed as an agricultural laborer." Since 1946, the appropriation acts for the Board have regularly carried a rider which provides that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the FLSA. This provision reads in pertinent part as follows:

"Agriculture" includes farming in all its branches and includes . . . the raising of poultry, and practices . . . performed by a farmer or on a farm as an incident to, or in conjunction with, such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Court stated with respect to this provision in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949), "this definition has two distinct branches." The primary meaning, which is inapposite here, involves actual farming operations such as the raising of produce from the soil. The secondary definition, in the Court's words, "includes any practices, which are performed either by a farmer, or on a farm, incidentally to or in conjunction with 'such' farming operations" (*ibid.*). As we show below, the conditions of the secondary meaning are not satisfied here.

The Supreme Court in the *Farmers Reservoir* case, specifically pointed out that under the second branch of the statutory definition, it is not only necessary that the practices in question be performed "by a farmer or on a farm" but they must also be incidental to "such" farming as is performed under the first branch of the definition. 337 U.S. at 766-767. As the Court stated

. . . there is the additional requirement that the practices be incidental to "such" farming. Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operations of the other farmers, and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is not within the definition of agriculture. *Bowie v. Gonzales*, 117 F.2d 11 (C.A. 1, 1941).

This principle has been recognized by the circuit courts including this one, which stated in *N.L.R.B. v. Olaa Sugar Company*, 242 F.2d 714, 718 (C.A. 9, 1957):

Our view, however, is that this hauling from the fields of the independent growers must be treated differently from the hauling from Olaa's own fields . . . Without

doubt Olaa is a farmer and its own cane lands constitute a farm, but the hauling of the cane from the independent growers' fields cannot be said to be incident to *such* farming operations, that is to say, Olaa's farming operations.

See also, *Waldo Rohnert Co. v. N.L.R.B.*, 322 F.2d 46, 49 (C.A. 9, 1963); *Mitchell v. Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286, 290 (C.A. 5, 1959); *Mitchell v. Hunt*, 263 F.2d 913, 917-918 (C.A. 5, 1959); *Chapman v. Durkin*, 214 F.2d 360, 363 (C.A. 5, 1954), cert. denied, 348 U.S. 897; *Fort Mason Fruit Co. v. Durkin*, 214 F.2d 363, 364 (C.A. 5, 1954), cert. denied, 348 U.S. 897; *Wirtz v. Osceola Farms Company*, 372 F.2d 584, 587-589 (C.A. 5, 1967); *Sweetlake Land and Oil Co. v. N.L.R.B.*, 334 F.2d 220, 222-223 (C.A. 5, 1964). We submit that the Board properly applied this principle here, since the coop truckdrivers deliver the results, not of the Company's farming efforts, but of the contract growers' efforts.

We are concerned here with the transportation function, which is itself a non-farming task, for "the [FLSA] expressly makes it application dependent upon the character of the employees' activities" *Kirchbaum Co. v. Willing*, 316 U.S. 517, 524. The record clearly shows that this function is not incidental to the Company's farming efforts, but rather to the farming efforts of the independent contractors. Thus, once the growers receive the Company's chicks, they are raised and grown by them to marketable size. The coop truckdrivers pick up the live poultry from the independent farms and deliver them to market. Significantly, the truckers performed this function under an independent contractor (Patterson) for many years in the same manner as they do now. They are supervised and dispatched by their old boss, report to work at the same place, weight their loads at the same place and generally perform as before.

Moreover, although the Company employs other truckdrivers for other tasks, those involved in hauling live poultry remain a clearly "identifiable, homogeneous group . . . performing a distinct and well delineated function in the [Company's] operations." (R. 50). Accordingly, such function is not incidental to the Company's hatchery operations, but rather constitutes a separate shipping and marketing operation. To the extent that it is incidental to farming, it is incidental to the raising of poultry which is performed not by it, but by the independent growers.

Any claim that the Company actually raises the poultry and is engaged in "such farming" as to which its trucking operations are incidental is unavailing. The Company simply provides the chicks to the growers. Its relationship with the growers clearly shows that thereafter, as to this phase of the Company's operations, the Company is not engaged in the "raising of poultry." Any exemption it may have by virtue of its hatchery operations⁶ is cut off when it transfers the chicks to independent farms for growth to maturity. Thus, as shown in the Statement, the growers provide the land, the equipment and, in accordance with the provisions in the Grower's Agreement that the contract growers "agree to raise birds furnished by Ryckebosch," it is the growers who do the work. The growers are constantly on guard against disease and predatory animals, both of which are dangers to a flock, and they must provide proper heating and ventilation, automatic feeding and watering equipment. Moreover, the contract grower's ultimate market price for all birds depends on

⁶ It is settled that hatchery employees are engaged in the raising of poultry and are therefore agricultural laborers within the meaning of the Fair Labor Standards Act and the National Labor Relations Act. *Miller Hatcheries v. Boyer*, 131 F.2d 283 (C.A. 8, 1942); *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967); *Central Carolina Farmers Exchange, Inc.*, 115 NLRB 1250 (1956); *Fairmont Foods Co.*, 81 NLRB 1092 (1949); *Lindstrom Hatchery & Poultry Farm*, 49 NLRB 776 (1943).

how economically he can raise the birds in relation to the performance of other farmers. This is directly related to the exercise of his independent judgment and skill in innovating changes he feels will produce that result (R. 47; Tr. 424-431, 549-552). The weekly visits to all 188 growers from one of only 5 Company field representatives are necessarily brief, are for consultation, and are not in the nature of employee to supervisor (Tr. 577-578). The Grower's Agreement does give the Company the right to come on the grower's farm in the event he is neglecting the birds; however, Gerald Frisch, a Field Service Representative of long standing, could recall only one incident of the Company's reclaiming birds from a grower and that involved a situation of total neglect (Tr. 582-583).

In addition, although the Grower's Agreement provides that "should a loss result, it will be borne by Ryckebosch," the record shows that the Company will only pay for birds that reach proper maturity; it pays the grower nothing for the birds that die from disease or for any other reason and also does not pay when birds are confiscated at the processor's plant by the United States Department of Agriculture (Tr. 456, 541-544, G.C. Exh. 3). If a loss occurs, the Company does assume the cost of the items it furnishes the growers — such as feed, medicine and the baby chicks — but in no event does the Company pay the growers for the use of their land, or for the value of the equipment furnished by the growers or for the value of the labor they expended (*supra*, p. 4; Tr. 541-545).

The growers' status *vis a vis* the Company is aptly described in Section 5 in the General Provisions of the Grower Agreement itself, which states that the "grower under this agreement is an independent contractor and is not a partner, agent, servant, joint-venturer, assistant, or employee of Ryckebosch . . ." (R. 47; G.C. Exh. 3). The Company entered into such arrangements with the growers to minimize the capital

investment that poultry raising obviously involved and to escape the primary responsibility of growing birds (*supra*, p. 4). By specifically availing itself of the independent contractor status of the growers, the Company severed itself from the farming aspect of raising poultry. In these circumstances, the Company can hardly contend that it may both retain the benefits of these independent arrangements and yet escape their obvious legal impact.

That the Company retained title to the birds, provided advisory and ancillary services and furnished a market for the birds does not undercut the Board's finding that the truckdrivers' work was incidental to the farming of the independent growers and not of the Company. In so finding, the Board accorded weight to the interpretative bulletins issued by the Department of Labor (R. 53). Section 780.135 of the Interpretative Bulletin, Title 29, part 780, Code of Federal Regulations provides as follows.

Contract arrangements for raising poultry.

Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly exempt. The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be exempt on that ground. . . .

This Court has likewise rejected the contention that title to the product and assistance to an independent farmer provides a basis for a contrary conclusion. In *Waldo Rohnert Co. v. N.L.R.B.*, 332 F.2d 46 (C.A. 9, 1963)

this Court upheld the finding that the employer's seed mill employees were not agricultural employees since 75 percent of the seed processed in the mill was grown by independent contract growers, notwithstanding the fact that the employer retained legal title to the seeds which it furnished the growers and, in addition, supervised the planting, inspected the growing crops, did all the rogueing (the removal of the undesirable plants), decided when the growers should weed, spray, and harvest, provided harvesting equipment such as canvas seed drying sheets and loading bins, and trucked the seed to its mill for processing. See also, *N.L.R.B. v. Gass*, 377 F.2d 438, 444 (C.A. 1, 1967), where the employer participated, as here, in the whole range of poultry production and retained title to poultry raised by independent farmers, but the court readily concluded that truckdrivers of the poultry producer who delivered feed from the producer's mill to the independent farms were not agricultural laborers.

Indeed, in a recent Board case involving facts very similar to those herein, the Board consulted the Labor Department and was administratively advised that drivers "engaged in hauling broilers from the farms of contract growers to [the] processing plant . . . are not agricultural employees within the meaning of the Fair Labor Standards Act." *Cotton Producers Association d/b/a C.P.A. Trucking Agency, Boaz*, 185 NLRB No. 79, at slip op. p. 5. 75 LRRM 1110, 1111 (1970). The Board's opinion continues:

Section 780.135 [of the code of Federal Regulation] indicates that in situations such as the one herein, when feed dealers or processors enter into a contractual arrangement with independent farmers whereby the farmers agree to raise poultry to marketable size and the feed dealer or processor supplies the baby chicks, furnishes the required feed, and retains title to the chickens until they are sold, the activities of the independent farmers and their employees in raising the poultry are clearly exempt but the activities

of the feed dealer or processor are not "raising of poultry" and their employees cannot be exempt on that ground. Section 780.149 states that where commodities are grown on the farm of an "actual grower" under contract with another farmer, practices performed by the contracting farmer on the commodities off the farm where they were grown relate to farming operations of the "actual grower" rather than to any farming operations of the contracting farmer. Section 780.169 emphasizes that when poultry is delivered to market "the delivery must be performed by the employees employed by the farmer in order to constitute an exempt practice." Section 780.172 similarly indicates that when poultry feed is delivered to a farmer for use in his farming operations, the transportation to the farm of such supplies is exempt if the truckdrivers are employed by the same farmer. Accordingly, Section 780.173 concludes that, for the exemption to apply, the practices must be performed on "products produced or raised by the particular farmer or on the particular farm."

See also, *John Bagwell Farms & Hatchery, Inc.*, 192 NLRB No. 81, 77 LRRM 1833 (1971) (feed mill employees).⁷ In these circumstances, the Board properly determined that the truckdrivers' work was incidental to the farming operations of the independent growers who actually raised the poultry they transported and not of their employer and that they were thus not exempt from coverage under the Act. This determination is also consistent with the settled principle of construction that the exemptions to the Fair Labor Standards Act are to be narrowly construed and should not be applied to fact situations "other than those plainly and unmistakably within its terms and spirit." *Phillips Co. v. Walling*, 324 U.S. 490, 493 (1945);

⁷ Copies of the Board's decisions in these cases have been lodged with the Court.

See also, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Anderson v. Manhattan Lighterage Corp.*, 148 F.2d 971, 973 (C.A. 2, 1945), cert. denied, 326 U.S. 722; *Mitchell v. Hunt*, 263 F.2d 913, 916 (C.A. 5, 1959).

In arguing for a different result in this case, the Company relies on the Fifth Circuit's decision in *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (1969). The facts in that case appear to be essentially the same as those involved here. There was not in *Strain*, however, the specific contractual arrangement which in this case so clearly indicates that the Company meant to sever itself from the actual raising of poultry and to place this function in the hands of completely independent contractors. Moreover, here, unlike in *Strain*, the trucking operation was performed for many years by another independent contractor whose operations were taken over by the Company. Nevertheless, we respectfully submit that *Strain* was wrongly decided and should not be followed by this Circuit.

Thus, in *Strain*, the Fifth Circuit reasoned that:

The fact that Strain hired the independent growers to raise its birds . . . would not seem to destroy its claim to having raised the poultry. Furthermore, the trucking activities were part of Strain's poultry raising venture. They were performed incident to or in conjunction with Strain's poultry raising operations and Strain was not a poultry raiser conducting a trucking operation on the side. The trucking operation was a part of an integrated poultry raising operation . . . The trucking operation does not appear inordinate in size, investment or time in relation to the rest of the operation (405 F.2d at 1030)

In reaching its decision, the Fifth Circuit placed great reliance on *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 (1955) (405 F.2d at 1029), particularly in applying criteria set forth therein to show that the trucking

operation was not inordinate in size, investment or time in relation to the rest of the employer's operations. These standards, however, were utilized by the Supreme Court to determine whether a processing mill — part of the integrated operations of a single farmer-employer — was or was not part of its agricultural venture. In *Maneja*, there was no intervention of independent farmers, as here, and there was no question that it was the farmer-employer's own farming with which its processing mill was connected. Here, unlike in *Maneja*, any agricultural exemption which the employer may possess by virtue of its hatchery operations is cut off when it makes the type of arrangement which the Company has made with the independent contract growers. It follows that the growers, and not Strain or the Company, are engaged in "the raising of the poultry" as to which the truckdrivers' work is clearly incidental.

In addition, in concluding that Strain raised the poultry, the Fifth Circuit relied heavily on the fact that "these birds belonged to [Strain] . . ." 405 F.2d at 1033. But, as we have shown, this Court in *Waldo Rohnert Co. v. N.L.R.B.*, *supra*, 322 F.2d at 46, and also the Labor Department in its interpretative bulletins, have indicated that neither title nor ancillary services provided to the growers is material. As the Board indicated in *Bagwell Farms*, *supra*, slip op. at p. 4 n. 5, such ownership is more properly viewed as "being in the nature of an investment." Furthermore, other F.L.S.A. cases relied upon by the Fifth Circuit are distinguishable on their facts. Thus, *Wirtz v. Tysons Poultry, Inc.*, 355 F.2d 255, 257 (C.A. 8, 1966) exempted from the Act's coverage employees at Tyson's egg assembly plant who were engaged in processing eggs, only 27 percent of which were raised by independent growers. However, in *Tyson's Poultry*, unlike the instant case, Tyson, and not the contract growers, "controlled and made all important decisions regarding the production of eggs" and the grower was paid a fixed price for eggs produced (*id.* at

256-257); whereas here, as shown *supra*, pp. 4-6, 17, each independent grower exercises independent skill and judgment in raising the birds and is paid on the basis of how economically he can raise them compared to the other independent growers. Likewise, in *Mitchell v. Georgia Boiler Supply, Inc.*, 186 F. Supp. 341 (1960) the arrangement with the growers more substantially preserved the employer-owner's interest in the poultry raising and was, unlike here, simply a "lease" agreement. Finally, *Miller Hatcheries Inc., v. Boyer*, 131 F.2d 283 (C.A. 8, 1942) is completely inapposite, as it involves commercial hatchery operations.

In sum, we submit the poultry transported by the drivers herein is raised by the independent growers and not by the Company. Accordingly, the Board's determination that the truckdrivers' activities were incidental to the farming operations of the independent growers and not of the Company and that they were thus not agricultural laborers within the meaning of the Act has "warrant in the record" and a "reasonable basis in law." That determination is therefore entitled to approval by this Court. *N.L.R.B. v. Hearst Publications, supra*; see *Waldo Rohnert Co. v. N.L.R.B.*, *supra*, and *N.L.R.B. v. Olaa Sugar Company, supra*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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SUPPLEMENTAL APPENDIX

Title 29, Part 780, Code of Federal Regulations:

§780.135 Contract arrangements for raising poultry.

Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly exempt. The activities of the feed dealer or processor on the other hand, are not "raising of poultry" and employees engaged in them cannot be exempt on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm and engage in no nonexempt activities during the workweek may, however, be exempt as employed in "secondary agriculture (see §§780.137 *et seq.*, and *Johnston v. Cotton Producers Ass'n.*, 244 F.2d 553).

§780.149 Place of performing the practice as a factor.

So long as the farming operations to which a farmer's practice pertains are performed by him in his capacity as a farmer, the exempt status of the practice is not necessarily altered by the fact that the farming operations take place on more than one farm or by the fact that some of the operations are performed off his farm (*NLRB v. Olaa Sugar Co.*, 242 F.2d 714). Thus, where the practice is performed with respect to products of farming operations, the controlling consideration is whether the products were produced by the

farming operations of the farmer who performs the practice rather than at what place or on whose land he produced them. Ordinarily, a practice performed by a farmer in connection with farming operations conducted on land which he owns or leases will be considered as performed in connection with the farming operations of such farmer in the absence of facts indicating that the farming operations are actually those of someone else. Conversely, a contrary conclusion will ordinarily be justified if such farmer is not the owner or a bona fide lessee of such land during the period when the farming operations take place. The question of whose farming operations are actually being conducted in cases where they are performed pursuant to an agreement or arrangement, not amounting to a bona fide lease, between the farmer who performs the practice and the land-owner necessarily involves a careful scrutiny of the facts and circumstances surrounding the arrangement. Where commodities are grown on the farm of the actual grower under contract with another, practices performed by the latter on the commodities, off the farm where they were grown, relate to farming operations of the grower rather than to any farming operations of the contract purchaser. This is true even though the contract purports to lease the land to the latter, give him title to the crop at all times, and confer on him the right to supervise the growing operations, where the facts as a whole show that the contract purchaser provides a farm market, cash advances, and advice and counsel but does not really perform growing operations (*Mitchell v. Huntsville Nuerseries*, 267 F.2d 286).

§780.169 Delivery “to market”.

The term “delivery * * * to market” includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or

their pelts, or poultry to market. It ordinarily refers to the initial journey of the farmer's products from the farm to the market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler or processor to which the farmer delivers his products. Delivery to market ends with the delivery of the commodities at the receiving platform of such a farmer's market (*Mitchell v. Budd*, 350 U.S. 473). When the delivery involves travel off the farm (which would normally be the case) the delivery must be performed by the employees employed by the farmer in order to constitute an exempt practice. Delivery by an independent contractor for the farmer or a group of farmers or by a "bird-dog" operator who has purchased the commodities on the farm from the farmer is not an exempt agricultural practice (see *Chapman v. Durkin* 214 F.2d 360, cert. denied, 348 U.S. 897; *Fort Mason Fruit Co. v. Drukin*, 214 F.2d 363, cert. denied 348 U.S. 897). However, in the case of fruits or vegetables, the Act provides a special exemption for intrastate transportation of the freshly harvested commodities from the farm to a place of first marketing or first processing, which may apply to employees engaged in such transportation regardless of whether they are transported by the farmer. See Subpart E of this Part 780, discussing the exemption provided by section 13(a)(22).

§780.172 Other transportation incident to farming.

(a) Transportation by a farmer or on a farm as an incident to or in conjunction with the farming operations of the farmer or of that farm is within the exemption for agriculture even though things other than farm commodities raised by the farmer or on the farm are being transported. As previously indicated, transportation of commodities raised by other farmers or on other farms would defeat the exemption. The

exemption clearly covers the transportation by the farmer, as an incident to or in conjunction with his farming activities, of farm implements, supplies, and field workers to and from the fields, regardless of whether such transportation involves travel on or off the farm and regardless of the method used. The Supreme Court of the United States so held in *Maneja v. Waialua*, 349 U.S. 254. Transportation of field workers to or from the farm by persons other than the farmer does not come within the exemption. However, under section 13(a)(22) of the Act, discussed in Subpart E of this Part 780, an exemption is provided for transportation, whether or not performed by the farmer, of fruit or vegetable harvest workers to and from the farm, within the same State where the farm is located. In the case of transportation to the farm of materials or supplies, it seems clear that transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as seed, animal or poultry feed, farm machinery or equipment, etc., would be incidental to the farmer's actual farming operations. Thus, truck drivers employed by a farmer to haul feed to the farm for feeding pigs are engaged in "agriculture."

(b) With respect to the practice of transporting farm products from farms to a processing establishment by employees of a person who owns both the farms and the establishment, such practice may or may not be incident to or in conjunction with the employer's farming operations depending on all the pertinent facts. For example, the transportation is clearly incidental to milling operations, rather than to farming, where the employees engaged in it are hired by the mill, carried on its payroll, do no agricultural work on the farms, and report for and end their daily duties at the mill where the transportation vehicles are kept (*Calaf v. Gonzales*, 127 F.2d 934. On the other hand, a different

result is reached where the facts show that the transportation workers are farm employees whose work is closely integrated with harvesting and other direct farming operations (*NLRB v. Olat Sugar Co.*, 242 F.2d 714; and see *Vives v. Serralles*, 45 F.2d 552). The method by which the transportation is accomplished is not material (*Maneja v. Waialua*, 349 U.S. 254).

OTHER UNLISTED PRACTICES WHICH MAY BE EXEMPT

§780.173 Examples of practices exempt if requirements of section 3(f) are met.

(a) As has been noted above, the term "agriculture" includes other practices performed by a farmer or on a farm as an incident to or in conjunction with the farming operations conducted by such farmer or on such farm in addition to the practices listed in section 3(f). The selling (including selling at roadside stands or by mail order and house to house selling) by a farmer and his employees of his agricultural commodities, dairy products, etc., is such a practice provided it does not amount to a separate business. Other such practices are office work and maintenance and protective work. The exemption applies, for example, to secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm. (*Damutz v. Pinchbeck*, 66 F. Supp. 667, aff'd. 158 F.(2d) 882). Employees of a farmer who repair the mechanical implements used in farming, as a subordinate and necessary task incident to the employer's farming operations, are within the exemption. It makes no difference that the work is done by a separate labor force in a repair shop maintained for the purpose, where the size of the farming operations is such as to justify it. Only employees engaged in the

repair of equipment used in performing agricultural functions would be exempt, however; employees repairing equipment used by the employer in industrial or other nonfarming activities would have to qualify under other exemptions if they are to be exempt (*Maneja v. Waialua*, 349 U.S. 254). The repair of equipment used by other farmers in their farming operations would not qualify for exemption as a practice incident to the farming operations of the farmer employing the repair workers.

(b) The following are other examples of practices which may qualify as "agriculture" under the secondary meaning in section 3(f), when done on a farm, whether done by a farmer or by a contractor for the farmer, so long as they do not relate to farming operations on any other farms: The operation of a cook camp for the sole purpose of feeding persons engaged exclusively in agriculture on that farm; artificial insemination of the farm animals; custom corn shelling and grinding of feed for the farmer; the packing of apples by portable packing machines which are moved from farm to farm packing only apples grown on the particular farm where the packing is being performed; the culling, catching, cooping, and loading of poultry; the threshing of wheat; the shearing of sheep; the gathering and baling of straw.

(c) It must be emphasized with respect to all practices performed on products, for which exemption is claimed that they must be performed only on the products produced or raised by the particular farmer or on the particular farm (*Mitchell v. Huntsville Nurseries*, 267 F.2d 286; *Bowie v. Gonzales*, 117 F.2d 11; *Mitchell v. Hunt*, 263 F.2d 913; *NLRB v. Olaa Sugar Co.*, 242 F.2d 714; *Farmers Reservoir Co. v. McComb*, 337 U.S. 755; *Walling v. Peacock Corp.*, 58 F. Supp. 880; *Lenroot v. Hazelhurst Mercantile Co.*, 153 F.2d 153; *Jordan v. Stark Bros. Nurseries*, 45 F. Supp. 769). If exempt at all, practices on farm products which fail to qualify under section 13(a)(6) must qualify under section 13(a)(10) or other exemptions for certain operations and practices on farm commodities.

MAY

1972

No. 71-2603

100-44573

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

v.

Petitioner,

KINNEY NATIONAL MAINTENANCE SERVICES, A DIVISION OF
WESTERN BUILDING MAINTENANCE COMPANY SERVICE AND
MAINTENANCE EMPLOYEES UNION, LOCAL 399, BUILDING
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Respondents.

No. 71-2699

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Petitioner,

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Application for Enforcement of, and On Petition to Review,
an Order of the National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

In its brief to the Court, the Company does not contest the Board's findings that it violated Section 8(a)(3), (2) and (1) of the Act by entering into and executing an agreement with Local 399 at a time when Local 399 did not represent a majority of its Parklabrea employees. Rather, the

Company's only argument focuses on the appropriateness of the dues reimbursement remedy.

I.

1. The Company asserts that the reimbursement remedy is inappropriate because the employees "ratified" the unlawful acts of the Company and Local 399 by voting for Local 399 in the May 1969 election which led to its certification. Insofar as the Company seeks to avoid liability for pre-certification payments to the Union, this contention is demonstrably without merit.¹ The question resolved in the election was whether the employees *then* desired representation by Local 399, not whether their adherence to Local 399 was coerced some 18 months before. This latter question was resolved against the Company upon overwhelming evidence of blatant Company assistance at its December 4, 1967, meeting with the Parklabrea employees. Indeed, prior to this meeting, not a single Parklabrea employee had signed a Local 399 card or, so far as appears, had expressed any kind of interest in Local 399. Yet, the Company told its employees on this occasion, in substance, that they would have to sign cards to retain their employment. The Company even supplied the cards, which most employees promptly executed, and a contract requiring union membership as a condition of employment and providing for dues check-off was thereafter enforced as to these employees. The Company in effect concedes that its statements on this occasion were coercive, that cards signed in these circumstances do not reflect a free choice of bargaining

¹ The Board's order does not require reimbursement of funds paid to Local 399 after its certification as exclusive bargaining representative, but only those monies "illegally exacted from them by or on behalf of Local 399" (Pl. 86, 157). See also, *Intalco Aluminum Corp.*, 174 NLRB 975, 976 (1969).

representative, and that the Parklabrea employees did not freely designate Local 399 as bargaining representative in December 1967. Moreover, this Court has held that cards executed in such circumstances are not valid indicators of employee sentiment and that union-security and dues check-off provisions predicated upon such cards are unlawful. See *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1357 (C.A. 9, 1970).

Given these uncontested facts, the Company is hardly in a position to argue that the employees voluntarily paid dues to Local 399 pursuant to a lawful union-security and dues checkoff agreement. The inference is warranted – indeed, compelling – that such payments as were made to the Union in December 1967 and thereafter were the direct result of the Company’s coercion and not the product of any free exercise of self-organizational rights. Thus, the argument that the Board is powerless to order reimbursement in this instance is tantamount to saying that the Board cannot compel the repayment of sums exacted pursuant to an illegal union-security and dues checkoff agreement. And acceptance of the Company’s view that certification of an assisted union moots an outstanding reimbursement order would plainly encourage employers and unions to organize first by the “‘successful coup’ technique” (*N.L.R.B. v. Food Employers Council*, 399 F.2d 501, 505 (1968)) and only then work towards having their actions “ratified” by the employees in a Board election.

2. Moreover, the Company’s position – that the intervening certification of Local 399 extinguished their joint and several liability for the reimbursement of dues unlawfully exacted prior to the certification – is logically unpersuasive. For, under the Company’s view, the enforcement of a reimbursement remedy would depend upon nothing more than the happenstance of the timing of a representation election. Thus, the Company would surely concede that if the election and subsequent certification

of Local 399 had occurred after this Court's enforcement of the dues reimbursement remedy, such subsequent certification would not serve to "ratify" the Company's unfair labor practices, or entitle the Company and Local 399 to a refund of the reimbursed dues. By the same token, the mere fact that the election and certification herein were scheduled and effected before this Court's enforcement of the dues reimbursement remedy in no way excuses the Company's unlawful conduct or renders the reimbursement remedy inequitable. In short, the enforceability of the dues reimbursement remedy depends upon whether dues were unlawfully coerced and not upon the plainly irrelevant fact that the election herein preceded rather than followed court review of the reimbursement order.

Of course, when an election is held despite outstanding unfair labor practices, the rival union waives its right to rely on the unremedied conduct as grounds for objecting to the election. But it is a very different matter to suggest, as the Company does, that the election shows that the employees were never actually coerced, or that the employees are no longer entitled to reimbursement for dues unlawfully exacted from them in the past, merely because they have expressed a present desire to be represented by the incumbent union. Thus, the Board has made an administrative determination to proceed with elections in certain cases where there are unremedied Section 8(a)(2) violations. In such cases the Board may conclude that "a further delay in affording [the] employees an opportunity to exercise their right to choose a representative is not warranted and that the desires of the employees may best be determined in an immediate election." *Intalco Aluminum Corp.*, *supra*, 174 NLRB at 978. See also, *Carlson Furniture Industries, Inc.*, 157 NLRB 851 (1966). There is no reason in logic or policy, however, why such a determination should have the effect of mootng an outstanding reimbursement order,

and there are ample reasons, discussed *supra*, why it should not be permitted to have this effect in the instant case. Indeed, if an incumbent's election victory carried with it an exoneration from any dues reimbursement liability, the prospects for a fair election would be substantially impaired. The employees would be forced to choose between voting for the incumbent and losing the right to recover past dues (which may, as in the instant case, amount to a substantial sum), and voting against representation (or for a rival union) thereby preserving intact their right to reimbursement. The real issue before the employees — which (if any) union could best represent their interests — might well be overshadowed by the clearly extraneous issue of whether the employees would retain their right to a lump sum cash payment. See *Intalco Aluminum Corp.*, 174 NLRB 975, *supra*, decided two months before the election in the instant case. It is apparent, therefore, that if the Company's view were to prevail, the Board would be left with little choice but to postpone the election in every case, until full compliance with the reimbursement order is secured perhaps years later.

For these reasons, the Company's contention that Local 399's certification relieves it of all liability under the Board's reimbursement order in this case is without merit.²

II.

The Company also contends that a reimbursement remedy is inappropriate because (1) the Company merely acted as a conduit through

² To the extent that the court's *per curiam* decision in *N.L.R.B. v. Englander Co.*, 237 F.2d 599 (C.A. 3, 1956) is inconsistent with these views, we respectfully disagree with it and urge this Court to enforce the Board's order in full.

which dues passed to the Union, (2) the Company extended the contract to the Parklabrea employees because it believed in good faith that they constituted an accretion to an existing unit, and (3) the employees enjoyed the benefits of union representation and are not entitled to a “windfall” in the form of returned dues. These contentions not only lack merit, but were also rejected by this Court in *Sheraton-Kauai*, where the Company, on substantially identical facts, contended that a dues reimbursement remedy against Sheraton was inappropriate. As Sheraton urged in its brief to this Court (pp. 27-28):³

The Trial Examiner did not recommend reimbursement of employees by the Respondents of dues and other fees for the several reasons that the employees have been receiving the benefits and protection of “legitimately negotiated Statewide agreement” and further “in bringing the Kauai employees within the coverage of the Statewide agreement, acted in good faith, a single Statewide unit also being appropriate for purposes of collective bargaining; and because at the time the Employer recognized the Respondent Union for its Kauai employees, no other labor organization had asserted a claim to represent these employees.”

Without specifically advertng to these defenses, the Court held that the Board properly reversed the trial examiner and imposed joint and several liability upon Sheraton and the assisted union. As the Court observed, since “coercion was established * * * by inference from the fact that the employees joined the union after being informed that they were bound by a collective bargaining agreement containing a union-security clause * * *,” a reimbursement remedy “effectuates the policies of the Act,

³ The Company herein has been served with a copy of Sheraton’s main brief.

for it 'returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company [and Union] whose unfair labor practices brought about the situation.' ” 429 F.2d at 1357-1358, citing to *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 541 (1943).

In its brief in this case, the Company almost completely ignores *Sheraton-Kauai* and relies upon *Intalco Aluminum Corp. v. N.L.R.B.*, 417 F.2d 36 (C.A. 9, 1969), notwithstanding the fact that *Sheraton-Kauai* specifically limited *Intalco* to a factual situation not even arguably present here, namely, where “prior to the time the collective bargaining agreement was extended to the new employees, the employer had a good faith belief that a majority of the employees had chosen to be represented by the union.” 429 F.2d at 1358, n. 6. The Company also relies on *Morrison-Knudsen Co. v. N.L.R.B.*, 276 F.2d 63, 73 (C.A. 9, 1960), a case which is even farther afield. Thus, in *N.L.R.B. v. Jan Power, Inc.*, 421 F.2d 1058 (1970), this Court not only enforced a dues reimbursement remedy in favor of employees who joined an assisted union after the execution of an unlawful union-security agreement – coercion analogous to that present in the instant case – but also distinguished *Morrison-Knudsen* in language which clearly demonstrates its inapplicability here. For, as the *Jan Power* decision states (421 F.2d at 1074):

In that case [*Morrison-Knudsen*] five identified men were coerced by the employer into joining a union as a condition of hiring. No other evidence was adduced as to coercion practiced on any other identified or identifiable union members. Nevertheless, the Board ordered a refund of all fees and dues to all present and past employees hired for work by the employer at a particular jobsite. This was held to be improper because (in the words of the Court):

“Unlike the case of the five students, no other *identifiable union members* who worked on the job can be shown to have been in any manner coerced in joining the union. No effort was made even to show *when* these men joined the union. Practically all of them have belonged for years.” [emphasis supplied by the Court in *Jan Power*].

In contrast, the Board’s order in our case specifies that a money refund is to be made * * * to those union members who are identifiable by reason of their joining the union after the execution of the Agreement. [Footnote omitted].

As to those who did join after the execution of the Agreement, it may be argued that the Board could have excluded those employees who voluntarily joined. Though the Board could have done so, it was not required to follow this course in the circumstances of this case.

* * *

We hold it reasonable for the Board to infer that those employees who joined the union after the execution of the agreement could well have been motivated by the overriding compulsion of that agreement and its union-security clause.

The cases in other circuits cited by the Company are also inapposite. Thus, in *N.L.R.B. v. Marcus Trucking Co., Inc.*, 286 F.2d 583, 593, 595 (1961), the Second Circuit emphasized the fact that the Board did not allege, and the evidence did not show, that any of the employees had been “pressured” into joining the unlawfully recognized union, thereby rendering a dues reimbursement remedy inappropriate in that case. Moreover, that portion of *N.L.R.B. v. U. S. Truck Co., Inc.*, 124 F.2d 887 (C.A. 6, 1942), relied on by the Company, was implicitly overruled by

the Supreme Court in *Virginia Electric Co. v. N.L.R.B.*, 319 U.S. 533 (1943). Thus, as the Tenth Circuit stated in *N.L.R.B. v. Broderick Wood Products Co.*, 261 F.2d 548, 558-559 (1958):

The stated reason for granting certiorari in *Virginia Electric* was because of the apparent conflict in the decisions of the courts of appeals [including *U. S. Truck*] concerning the authority of the Board to require reimbursement of checked-off dues. We must accept the opinion, therefore, as intended to clarify that question. The case makes it clear that the Board has wide discretion in ordering affirmative action against persons found engaging in unfair labor practices, that the particular means for expunging the effects of unfair labor practices are for the Board and not the courts to determine, that the Board *does* have the power to order reimbursement by the employer, and that when it so orders, its decision should stand unless there is a showing that the order is a patent attempt to achieve ends not designed to fairly effectuate the policies of the Act. [Emphasis in original].

In sum, we submit that the Board's order requiring the Company and Local 399 jointly and severally to reimburse employees for monies unlawfully exacted from them by, or on behalf of, Local 399, constitutes a reasonable exercise of its broad remedial authority. *Sheraton-Kauai, supra*, 429 F.2d at 1357-1358; *Jan Power, supra*, 421 F.2d at 1074.

CONCLUSION

For all these reasons, as well as those stated in our main brief, we respectfully submit that the Board's order should be enforced in full.

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May 1972.

United States Court of Appeals FOR THE NINTH CIRCUIT

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 71-2603

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

KINNEY NATIONAL MAINTENANCE SERVICES, A DIVISION OF
WESTERN BUILDING MAINTENANCE COMPANY SERVICE AND
MAINTENANCE EMPLOYEES UNION, LOCAL 399, BUILDING
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Respondents.

No. 71-2699

KINNEY NATIONAL MAINTENANCE SERVICES, A DIVISION
OF WESTERN BUILDING MAINTENANCE COMPANY,
v. *Petitioner,*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Application for Enforcement of, and on Petition to Review, an Order
of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(2), (3) and (1) of the Act by prematurely recognizing Local 399 as the exclusive bargaining

representative of its employees, unlawfully assisting Local 399 in obtaining signed application-for-membership and dues checkoff cards, and maintaining and enforcing an agreement with Local 399 (including a union-security provision) at a time when it was not the freely designated bargaining representative of a majority of the Company's employees in an appropriate unit.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Local 399 violated Section 8(b)(2) and (1)(A) of the Act by agreeing to and enforcing the terms of this contract, including its union-security provision.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers.

4. Whether the Board properly ordered the Company and Local 399, jointly and severally, to reimburse the Company's employees for dues unlawfully exacted from them on behalf of Local 399.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, in Case No. 71-2603, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order (Pl. 128-131)¹ issued on June 30, 1969, against Kinney National Maintenance

¹ "Pl." references are to the Decision and Order of the Board, the Trial Examiner's Decision and other papers reproduced in a volume entitled "Pleadings." References designed "Tr." are to the transcript of testimony; "G.X.", to General Counsel's exhibits, and "Co. X." to the Company's exhibits — all in the unfair labor
(cont'd)

Services, a Division of Western Building Maintenance Company (hereinafter referred to as "the Company") and Service and Maintenance Employees Union, Local 399, Building Service Employees International Union, AFL-CIO (hereinafter referred to as "Local 399"). This case is also before the Court, in Case No. 71-2699, upon the petition of the Company to review and set aside the aforesaid order issued against it by the Board.² The Board's decision and order are reported at 177 NLRB 379. No issue of jurisdiction is presented in this case.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1), (2) and (3) of the Act by assisting Local 399 in obtaining signed application and checkoff cards, by recognizing Local 399 as the exclusive bargaining representative of its Parklabrea maintenance employees and by executing and enforcing the provisions of a collective bargaining agreement with Local 399 (including a union security clause), all at a time when Local 399 was a minority union and not the freely designated bargaining representative of a majority of said employees. The Board further found that Local 399 violated Section 8(b)(1)(A) and (2) of the Act by entering into and enforcing the aforesaid collective bargaining agreement. Finally, the Board concluded that the Company violated Section 8(a)(3) and

¹ cont'd) practice case heard below—"R-Tr.", "R-GX" and "R-Co.X" refer to the transcript, General Counsel's exhibits, and the Company's exhibits, respectively, which constitute the record in the representation case heard below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² On December 6, 1971, the Court issued an order holding in abeyance the Board's Motion to Dismiss the Company's Petition to Review the Board's Order, pending the Court's decision in this case on the merits.

(1) of the Act by refusing to reinstate strikers who were striking in protest over the unlawful recognition of Local 399. The evidence upon which these findings are based is summarized below:

A. Background and Bargaining History

The Company is one of six wholly-owned subsidiaries of Kinney National Services, Inc., all located in the Los Angeles metropolitan area, engaged in the business of furnishing cleaning, operating and maintenance services to various buildings, most of which are used for commercial purposes (Pl. 72-73; Tr. 5-6, 49-50). Metropolitan Life Insurance Company (hereinafter referred to as "Metropolitan") owns and operates a large residential apartment complex in Los Angeles commonly known as Parklabrea (Pl. 73; R. Tr. 84). Prior to December 5, 1967, Metropolitan performed the cleaning and maintenance functions at Parklabrea with its own employees (*Ibid.*). These employees were not represented by any union, although between July and November 1967, several employees had signed authorization cards on behalf of Miscellaneous Warehousemen, Drivers & Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 986") (Pl. 73; Tr. 290, 302, 304, 308, 349-350). During November 1967, Metropolitan Life and the Company entered into an oral agreement whereby the Company, beginning on December 5, 1967, would undertake the cleaning and maintenance functions at Parklabrea with Metropolitan's existing staff of maintenance employees (Pl. 73; Tr. 54-55).

The Company and its affiliated subsidiaries in the Los Angeles area were parties to a master collective-bargaining agreement, covering their respective employees, with Local 399 and several of its sister locals (Pl.

73; R.-GX 2D, Co. X 1).³ Under this contract Kinney agreed to "recognize * * * the Union as the sole collective-bargaining representative for its employees within the industry within the area of Los Angeles and vicinity * * *." An appendix to the master agreement set forth wage rates for "Office Building" and "Industrial Establishment" maintenance work but contained no rate for residential or apartment complex maintenance work.

Sometime prior to December, Local 399 and Kinney agreed to apply the recognition clause of the master agreement to the Parklabrea project. Local 399 advised the Company, however, that it would insist upon making various changes in the master agreement insofar as it would apply to the Parklabrea employees, and the Company made certain counterproposals for further modifications (Pl. 73; R-Tr. 55-56, 84). By December 2, 1967, after about six meetings, the parties agreed upon the terms of a supplemental contract governing the Parklabrea maintenance employees, which was not signed and executed until December 5 (Pl. 73; G.X. 2-C, R-Co. X 2, R-Tr. 56-57).

B. The Company organizes the Parklabrea maintenance employees on behalf of Local 399

On December 4, one day before the supplemental agreement between the Company and Local 399 was executed, Metropolitan Life convened a meeting of its approximately 150 Parklabrea maintenance and service employees, with about 130 employees in attendance (Pl. 73; R-Tr. 92-93). Metropolitan informed its employees that the Company would take over

³ The effective date of this agreement was February 17, 1967 (Pl. 73).

the maintenance and service functions the following day, and that their employment by Metropolitan would cease as of 12:01 a.m. on December 5 (*Ibid.*). The president and general manager of the Company and its Los Angeles affiliates, Jay Raskin, then addressed the assembled employees and invited them to apply for employment with the Company at the same rate of pay they were receiving and outlined additional benefits which they would receive (Pl. 73; R-GX 2J). Thereafter, at the close of his remarks, Raskin introduced Gerald Conroy, the Company's new project manager at Parklabrea, as well as 8 to 10 other Company representatives, who were to conduct employment interviews (P. 73; Tr. 294-295, 309, R-GX 2J). Thereupon the Company representatives, who were identified by their badges bearing the name "Kinney", distributed packets of literature to each employee (Pl. 73; Tr. 200, 203, 287, 69). These employment packets contained the following documents: (1) A Notice to New Employees which stated, *inter alia*, that the Company was a party to a collective bargaining agreement with Local 399 requiring new employees to become and remain members in good standing of Local 399 within 30 days as a condition of employment; (2) A Company employment application and W-4 form; (3) A series of cards constituting an application for membership in Local 399; (4) An authorization for payroll deduction of Local 399 dues and initiation fees; (5) A designation of beneficiary under Local 399's health and welfare trust fund; (6) The master contract and the supplemental agreement between the Company and Local 399; and (7) Various booklets and leaflets describing the health and pension plans of Local 399. The employees were orally informed that the Company was providing them with Local 399 applications and checkoff cards which, if signed, would be transmitted by their new employer to the Union (TXD 3-4; Tr. 94-95, R-GX 2A-2I).

Approximately 95 of the employees present signed Local 399 application and checkoff cards and gave them to the Company representatives

at the meeting of December 4 (Pl. 74; Tr. 71).⁴ The following day, 29 additional authorizations were submitted to the Company (Pl. 74; Tr. 72). The Company, in turn, transmitted the membership applications and check-off cards to Local 399, hired those applicants, and, pursuant to the check-off, deducted dues from the employees' wages which were paid over to the union (*Ibid.*)

C. The strike protesting representation by Local 399 and the Company's refusal to reinstate the unfair labor practice strikers

Shortly after the December 4 meeting, employee Francizek Kurnick, a member of Local 986, declared to about 20 other employees that he had a right to select his own union (Pl. 74; Tr. 313, 315). Thereafter, in December and January, a number of Parklabrea's maintenance employees held several meetings with Local 986 representatives (Pl. 74; Tr. 165, 172). One was an organizational meeting and another was devoted to a discussion of the unfair labor practice charge, challenging the manner in which recognition was conferred upon Local 399, filed by Local 986 against the Company on December 7, 1967 (Pl. 82-83; Tr. 171-172, G.X. 1(a)). Finally, after further discussion of the charges at a meeting held on January 31, attended by approximately 70 employees, a Local 986 representative asked the assembled employees whether they wanted Local 399 or Local 986 as their bargaining representative (Pl. 83; Tr. 172-173). The employees voiced their support for Local 986, and some called for

⁴ In at least two instances, Company representatives filled in the cards for Local 399 and persuaded the employees simply to sign them, despite their urgings that they did not have their glasses and therefore did not know what they were signing (Tr. 254, 289, 309).

a strike (*Ibid.*). The union representative then explained that the resolution of the charges before the Board could take a long time, that those who struck could lose their jobs, and that they should carefully consider the problem before they decided to strike (Pl. 83; Tr. 173-176). Nevertheless, the employees voted overwhelmingly to strike (Pl. 83; Tr. 176).

On February 5, some 35 to 40 of the Company's employees struck and began picketing at Parklabrea with picket signs which read: "Kinney Operations at Parklabrea On Strike, Teamster Local 986" (Pl. 83; Tr. 73-74, 180, 298-299).⁵ During the first week of the strike, some of the strikers passed out handbills stating, *inter alia*, that the men were on strike because they had been forced to join Local 399, a union they did not want, and because they desired an election by secret ballot (Pl. 83; G.X. 5A, 5B).

On February 29, Local 986 sent a telegram to the Company which contained an unconditional offer on behalf of all of the strikers to return to work (Pl. 83; G.X. 6). On March 4, 1968, more than half of the strikers appeared at Parklabrea and personally made unconditional offers to return to work (Pl. 83; Tr. 181-182, 207, 365-367). As of the date of the hearing below, the Company had not offered reinstatement to 25 strikers.

⁵ On the same day, Local 986 filed a petition for certification as the bargaining representative of the Parklabrea employees, pursuant to which a hearing was held in Case No. 31-RC-763, at the urging of Local 986 and upon its commitment that it would withdraw its charges should it be certified as the bargaining representative of such employees (Pl. 74, n. 5). By stipulation, the transcript of testimony and the exhibits received in Case No. 31-RC-763 were made a part of the record in the instant proceeding.

D. Management and operation of Parklabrea

1. The Company and its affiliates

The Company and its five affiliates employ approximately 1800 employees at about 600 job locations in the Los Angeles Metropolitan area (Pl. 75; Tr. 37, 39, 40). Thus, the Company services another apartment complex,⁶ several commercial buildings, a sports arena known as the Forum, airport passenger terminal facilities and a television studio. The Company and its affiliates have a single payroll department, one chief executive officer and general manager, one controller and one overall labor policy for all job locations (Pl. 76; R-Tr. 38-39, Tr. 114). Although all jobs are covered by a single master agreement between the Company and its affiliates, on the one hand, and Local 399 and certain sister locals, on the other hand, supplementary agreements, such as the one which covered Parklabrea and about 10 to 15 other job locations, "are necessary . . . because of special conditions that arise from time to time on a given plant or industrial consideration that calls for it [sic]," as for example, the wage structure of the job (Pl. 76, n. 9; R-Tr. 65, 81). Indeed, some of the supplements "have deleted the substantial part of all sections" of the master agreement (Pl. 76, n. 9; R-Tr. 78).

2. The Parklabrea maintenance operation

The Parklabrea complex comprises 18 high-rise towers as well as additional garden-type buildings occupying approximately 170 acres and

⁶ The Wilshire-Comstock apartment complex, consisting of 200 apartments in two 20-story buildings, where the Company employs 12 to 15 maintenance employees, does not approach the size of the Parklabrea project (Pl. 76, n. 6; R-Tr. 71-72).

containing more than 4000 apartments (Pl. 77; Tr. 55, R-Tr. 60-61).⁷ The project also includes a recreation area, garage facilities, and a maintenance building housing specialized maintenance shops (Pl. 77; Tr. 55). The Company employs about 150 employees at Parklabrea who are roughly divided into three specializations: porters, grounds-keepers and semi-skilled handy-men (Pl. 77; Tr. 55-57, R-Tr. 41, 65-68). These employees perform duties at Parklabrea which are substantially similar to those performed by employees at other Company locations, such as, picking up and hauling trash, cleaning and waxing floors, cutting and trimming grass, performing light repair work including carpentry, electrical maintenance, plumbing, repair of stoves, venetian blinds, and sprinklers, and maintaining automobiles (*Ibid.*).⁸ Metropolitan Life made 20 to 25 automobiles available to the Company for use exclusively in connection with its maintenance activities at Parklabrea (Pl. 77; Tr. 136-137).

When the Company undertook the Parklabrea operation, it brought in its own project manager, Conroy, who confines himself exclusively to the management of Parklabrea (Pl. 77; Tr. 83). He supervises the daily activities of the employees and has the authority to hire and fire at Parklabrea without consulting the Company's central office (Pl. 77; Tr. 88). The Company did not bring in any other permanent supervisory employees (with the exception of Avon, the office manager), but either retained

⁷ The Company's other jobs, 90 percent of which are located within a 10-mile radius of Parklabrea, do not resemble Parklabrea in the size of the latter's geographic area and work force (Pl. 77; R-Tr. 61-62, 69-70). The airport project is geographically larger but requires fewer personnel than Parklabrea; conversely, the Company employs more employees at the Forum than at Parklabrea but the Forum is smaller in area (Pl. 70, n. 7).

⁸ Unlike its operations at Parklabrea, most of the Company's other maintenance activities are performed at night (Tr. 94).

Parklabrea employees already occupying supervisory positions, or filled vacancies by promotion of rank-and-file employees (Pl. 77; Tr. 102, R-Tr. 84-85). Since the time that the Company took over the Parklabrea complex, there has been no interchange of nonsupervisory employees within Parklabrea or between Parklabrea and the employer's other job locations, except on two occasions: On February 5, 1968, when the strike began, approximately a dozen porters and handymen were transferred into Parklabrea as replacements for strikers; one month later, when some strikers were reinstated, several of their replacements were transferred out of Parklabrea (Pl. 77; R-Tr. 211-213, 214-218).⁹

The supplemental agreement of December 5 (*supra*, p. 5), covered only the Parklabrea employees and substantially altered the terms and conditions of the master agreement as applied to them (Pl. 77; R-Tr. 80, 83-84). Thus, it provided that a number of the terms in the master agreement would not be applicable to Parklabrea employees, such as those permitting Local 399 to strike if the Company failed to check off dues or otherwise violated the contract; provisions regulating maintenance of working conditions, including employee speed-up, layoff, termination, and sub-contracting; and other terms relating to employee leaves of absence because of illness and injury (Pl. 77-78; R-Co. X 1). In addition to abrogating portions of the master agreement, the supplemental contract provided for substantially higher rates of pay for Parklabrea employees than those prevailing under the master agreement. The supplement created four new job classifications (covering all Parklabrea maintenance employees), none of which appear in the master agreement. For these classifications the supplement established weekly wage

⁹ Raskin testified that, in general, the Company interchanges its employees freely as the need arises, but that there had been no interchange in Parklabrea because the Company had been servicing it for only a short period of time (Pl. 77; R-Tr. 145-147).

rates ranging from \$91.50 to \$129.50 as opposed to hourly wage rates ranging from \$2.08 to \$2.53 contained in the master agreement. It also made changes in the provisions relating to overtime and vacation pay and provided that Parklabrea employees would receive one paid holiday in addition to those named in the master agreement (Pl. 78; R-Co. X 1).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board concluded that by distributing the notice of the union security agreement and the Local 399 application and checkoff cards to its Parklabrea maintenance employees, by accepting signed cards from such employees for transmittal to Local 399, and by checking off their dues, the Company unlawfully assisted Local 399 in organizing its employees in violation of Section 8(a)(1) and (2) of the Act. The Board further concluded that by reaching an oral agreement on the terms of a supplemental contract covering the Parklabrea employees, by executing said contract, by extending the union security and other provisions of the master agreement to said employees, and by maintaining and enforcing the supplemental and master contracts as to such employees, all at a time when Local 399 did not represent a free, unassisted and uncoerced majority of said employees, the Company violated Section 8(a)(1), (2) and (3) of the Act, and that by reason of its participation in this conduct, Local 399 violated Section 8(b)(1)(A) and (2) of the Act. Finally, the Board concluded that the Company violated Section 8(a)(3) and (1) of the Act by its refusal and failure to reinstate unfair labor practice strikers who were striking to protest their employer's conduct in imposing Local 399 upon them as their bargaining representative.

The Board ordered the Company and Local 399 to cease and desist from the unfair labor practices found. Affirmatively, the Board ordered

the Company and Local 399 jointly and severally to reimburse all of its former and present Parklabrea employees for all dues and monies illegally exacted on behalf of Local 399. The Board also ordered the Company to offer immediate and full reinstatement, together with backpay, to those unfair labor practice strikers who have not been reinstated.¹⁰ Both respondents were ordered to post appropriate notices.¹¹

III. SUBSEQUENT PROCEEDINGS

Thereafter, on November 6, 1970, the Company filed before the Board a Petition to Modify in Part the Board's Order, urging the Board to eliminate the dues reimbursement provision in its remedy. On November 27, 1970, General Counsel submitted a memorandum in opposition to the Company's petition. On November 30, the Company filed a reply (Pl. 151, 154). On February 19, 1971, the Board denied the Company's petition to modify, rejecting the Company's argument that there were "unusual circumstances" which would make "the Board's customary remedial order inappropriate in this proceeding" (Pl. 157).

¹⁰ The Board has been informed by the Regional Director for Region 31 that the Company has thus far satisfactorily complied with the Board's order with regard to 23 of the 25 reinstatees. Any issues respecting compliance are deferred to supplemental proceedings and no such issues are presented here, in accordance with settled procedures.

¹¹ Local 399 was ultimately certified as bargaining representative for the Parklabrea employees after it won an election held on Local 986's petition in Case No. 31-RC-763. See *supra*, p. 8, n. 5. The Board therefore deleted those portions of the Trial Examiner's recommended order which would have required the Company to withhold recognition from Local 399 and would have forbidden Local 399 from acting as bargaining representative.

ARGUMENT

- I. THE BOARD PROPERLY FOUND THAT THE COMPANY AND LOCAL 399 VIOLATED SECTION 8(a)(3), (2) AND (1), AND SECTION 8(b)(2) AND (1)(A), RESPECTIVELY, BY AGREEING TO AND EXECUTING A SUPPLEMENTAL AGREEMENT COVERING THE PARKLABREA EMPLOYEES, AND EXTENDING THE COVERAGE OF THEIR MASTER AGREEMENT, INCLUDING ITS UNION SECURITY PROVISION, TO THE PARKLABREA EMPLOYEES, ALL AT A TIME WHEN LOCAL 399 DID NOT REPRESENT A MAJORITY OF SAID EMPLOYEES; AND THAT THE COMPANY FURTHER VIOLATED SECTION 8(a)(2) AND (1) OF THE ACT BY ASSISTING LOCAL 399 IN OBTAINING UNION APPLICATION AND CHECKOFF CARDS

A. Introduction

Section 8(a)(2) of the Act invokes a “clear legislative policy to free the collective bargaining process from all taint of an employer’s compulsion, domination or interference.” *International Ass’n of Machinists, Lodge 35 v. N.L.R.B.*, 311 U.S. 72, 80 (1940). In furtherance of this policy, “[i]t has been repeatedly held that an employer may not intrude in matters concerning the self-organization of his employees. He must refrain from all interference . . .” *Harrison Sheet Metal Co. v. N.L.R.B.*, 194 F.2d 407, 410 (C.A. 7, 1952). Thus, it has long been recognized that an employer violates Section 8(a)(2) of the Act when his supervisors solicit signatures to union authorization or membership cards, or otherwise assist a union in organizing his employees. *Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 520 (1941); *Int’l Ass’n of Machinists v. N.L.R.B.*, *supra*, 311 U.S. at 80-81 (1940); *N.L.R.B. v. Golden State Bottling Co.*, 353 F.2d 667, 670 (C.A. 9, 1965); *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 221 (C.A. 7, 1970); Compare *N.L.R.B. v. Sellers*, 346 F.2d 625, 629 (C.A. 9, 1965). Moreover, it is well settled that an employer and a union violate the Act when they agree to and enforce a

collective bargaining agreement, according the union exclusive recognition as the employees' statutory bargaining representative, at a time when a majority of the employees have not freely selected the union as their bargaining representative. Such conduct constitutes a violation of Section 8(a)(2) and (1) of the Act by the employer and of Section 8(b)(1) (A) by the union. *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). If the contract contains a union security clause, requiring employees to join the union as a condition of their continued employment, execution and maintenance of the contract also constitute a violation of Section 8(a)(3) by the employer and Section 8(b)(2) by the union. *Local Lodge 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 412-414 (1960); *N.L.R.B. v. Food Employers Council, Inc.*, 399 F.2d 501, 502 (C.A. 9, 1968); *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1354-1356 (C.A. 9, 1970).

Undisputed evidence shows that without consulting the Parklabrea employees and in the absence of any evidence that they wished to be represented by any union, the Company and Local 399 agreed to apply to the Parklabrea employees the union recognition clause and other provisions of a master agreement then in effect covering other employees at other job locations. Moreover, the uncontradicted testimony of the Company's president and general manager, Jay Raskin, establishes that on December 2, before the Parklabrea maintenance employees were even informed that they were to be employed by Kinney much less represented by Local 399, the Company and Local 399, following six negotiating sessions, came to an "agreement in the sense of an understanding" expressing their mutual satisfaction with the terms and conditions of a supplemental agreement which was to cover the Company's soon-to-be acquired Parklabrea employees (R. Tr. 58-59). Finally, the record reveals that, on December 4, the Company distributed to the assembled Parklabrea

employees a notice informing them that they were now subject to a collective bargaining agreement between their new employer and Local 399, under the provisions of which they were required to "join and remain a member in good standing of Local 399 after 30 days of employment with this Company" or else face discharge at the request of Local 399. The Company also distributed the forms and described the procedures whereby the employees could join the union, retain their employment, and have their union dues deducted from their paychecks (Tr. 94-95; G.X. 2B). Thereafter, the Company and Union executed a written supplemental agreement incorporating the terms of the December 2 oral agreement; and many of the terms of the master agreement, including its union-security provision requiring union membership as a condition of employment, were applied by respondents to the Parklabrea employees.

Under the principles outlined above, this conduct amounts to patently unlawful assistance and discrimination within the meaning of Section 8(a)(3), (2) and (1) and 8(b)(2) and (1)(A) — unless, as respondents contend, the Parklabrea employees had no right to a voice in the selection of a bargaining representative but constituted a mere "accretion" to an existing bargaining unit. We show below that this contention is without merit.

B. The Board Properly Concluded that the Parklabrea Maintenance Employees Were Not an Accretion to an Existing Unit

In determining whether a new group of employees is assimilated into an existing bargaining unit as an accretion, or is entitled to make its own choice of representation as an independent unit, the statutory mandate of Section 9(b) of the Act, as well as its underlying policies, "necessarily allow the Board, enlightened by continuing experience, to exercise 'a large

measure of informed discretion.’ *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 491 . . .’ *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1355.¹² Accord: *N.L.R.B. v. Sunset House*, *supra*, 415 F.2d at 548. This Court has observed that:

An “accretion” is, by definition, merely the addition of new employees to an already existing group. When the new employees are added to and co-mingled with the existing employees so as to lose their separate identity their inclusion in an existing bargaining unit follows as a matter of course. Questions arise only when the new group remains identifiable, for example, as when they constitute a separate department or store or plant. In these situations . . . the Board will examine the entire picture before permitting the new employees to be swallowed up by the bargaining representative of other employees without expressing their wishes in the matter

N.L.R.B. v. Food Employers Council, Inc., 399 F.2d 501, 502-503 (C.A. 9, 1968). Accord: *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1354, n. 2.

¹² As this Court stated in *Sheraton-Kauai*, *supra*, 429 F.2d at 1354-1355:

Section 9(b) of the Act, which requires the Board to determine the unit appropriate for collective bargaining, provides that the Board shall choose the unit which will “assure to employees the fullest freedom in exercising the rights guaranteed” by the Act; namely, “the right to self-organization, to form, join, or assist organization . . . [and] the right to refrain from any or all such activities.” Section 7 of the Act . . . And, of course, the Board should exercise its authority under section 9(b) in such a way as to effectuate the Act’s general purpose of minimizing industrial strife by encouraging collective bargaining

The question of “whether a group of employees represents as ‘accretion’ to an existing unit, so that the group is governed by the larger unit’s choice of bargaining representatives, is similar to the issue of a particular unit’s ‘appropriateness’ for purposes of bargaining.” *N.L.R.B. v. Sunset House*, *supra*, 415 F.2d at 547, quoting *N.L.R.B. v. Food Employers Council*, *supra*, 399 F.2d at 502. Accord: *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1355. But in deciding the accretion issue the Board not only considers such unit factors as functional integration, level of management control, similarity of working conditions, bargaining history, employee interchange, and physical separateness; the Board also gives special weight to the interest of new employees in exercising their own rights of self-organization. *N.L.R.B. v. Food Employers Council*, *supra*, 399 F.2d at 504. In cases analogous to this one the Board “normally permits employees at a new operation to decide whether or not they wish to be separately represented.” *Hilton-Burns Hotel Co.*, 167 NLRB 221 (1967), 66 LRRM 1033, 1034, n. 6, and cases there cited. “Hence, the Board has held that even though it might have found an overall unit appropriate on a representation petition, and thus have given all employees at all locations an equal voice in the initial representation decision, it would not ‘under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the union to represent them.’ *Melbet Jewelry Co.*, 180 NLRB No. 24 (1969).” *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1356. See also *N.L.R.B. v. Sunset House*, *supra*, 415 F.2d at 548; *Spartans Industries, Inc. v. N.L.R.B.*, 406 F.2d 1002, 1005 (C.A. 5, 1969).

In other words, as these decisions recognize, there is a real difference between including employees in a broader unit for purposes of conducting

an election and holding that such employees belong in the broader unit by virtue of a pre-existing collective-bargaining agreement between their employer and a third-party union. As the Board observed in the instant case, "Where there are competing claims for a single-plant and multi-plant unit, the resolution of such claims does not deprive the employees of their right to vote" (Pl. 80). On the other hand, where the "claim is made that a group of employees constitutes an accretion to an existing unit, a determination in favor of accretion forecloses a vote and thus restricts the employees in the exercise of their basic right to select their bargaining representative" (*Ibid.*). In short, as this Court stated in *N.L.R.B. v. Food Employers Council*, *supra*, 399 F.2d at 505, n. 1:

In situations in which complex and difficult factual determinations are necessary . . . it would seem advisable — and not unduly burdensome — for unions such as the respondent here to resolve close questions concerning the extension of bargaining agreements in favor of proselytizing the employees in question rather than seeking to represent them through the *fait accompli* of accretion. We frown upon the "successful coup" technique

In the instant case, the record clearly supports the Board's finding that the Parklabrea maintenance employees "have a community of interest apart from Kinney's other employees and should not be required to accept Local 399 as their bargaining representative without their consent" (Pl. 80). Thus, as the Board found, the "Parklabrea project is a completely self-sustaining and autonomous operation with its own independent supervision and its own facilities" (*Ibid.*). The work force itself is large, consisting of some 150 employees, and the responsibility which they share is to maintain a residential community of 170 acres and more than 4000 apartment units. The project is unique in that Kinney services no residential apartment complex of similar size and scope in Southern

California.¹³ Parklabrea has its own project manager who confines himself to management of that operation, and has power to hire and fire Parklabrea employees without consulting his superiors.

The Parklabrea employees plainly constituted a distinct, homogenous group before their transfer to Kinney, and no changes were imposed by Kinney which caused it to lose its identity. On the contrary, the Parklabrea operation and its work force were acquired virtually intact. Metropolitan's supervisory personnel were retained by Kinney and supervisory vacancies were filled by promotions within the ranks. Moreover, not a single Kinney employee was transferred to or from the Parklabrea project during the first 60 days of operation. As the Board reasoned, "[w]hether or not they may in the future be interchanged with those at Kinney's other job locations, the only such interchange shown by the record [between the date Kinney began operations at Parklabrea on December 5 and the date of the hearing in this case, March 26-29] occurred as a result of the [February 5] strike, not because of any normal integration of the Parklabrea work force with Kinney's other employees" (Pl. 80).

The Company and Local 399 have recognized from the outset that the Parklabrea employees share interests apart from other Kinney employees, for they negotiated a supplemental agreement covering these employees which substantially modified the terms of the master agreement, providing, for example, for higher wage rates and an additional paid holiday, and dividing the Parklabrea employees into four job classifications not found in the master agreement. Thus the lowest paid classification under the supplemental agreement was \$91.50 for a 40-hour week, almost 10 percent higher than the lowest rate under the master agreement.

¹³ Indeed, Kinney maintains only one other apartment complex of any description, and this complex employs only 12-15 maintenance personnel. *Supra*, p. 9, n. 6. A supplemental agreement covers these employees (R. Tr. 86).

The highest 40-hour rate provided in the supplemental agreement (maintenance operator) was \$129.50, compared with \$2.53 per hour (\$101.20 for a 40-hour week) under the master agreement. Moreover, the supplemental agreement specifically acknowledged that some employees in each classification were currently earning more than the rate set forth therein, and the supplement provided that such employees were to continue to earn their current weekly wages, which for some employees were as high as \$139 per week.

The Board properly characterized these wage differentials between the master agreement and the Parklabrea supplemental agreement as "not insubstantial" (Pl. 80). Indeed, the terms of the master agreement would themselves seem to foreclose any argument that the Parklabrea employees merely became part of an "already existing group" (*N.L.R.B. v. Food Employers Council, Inc.*, *supra*, 399 F.2d at 502-503). Thus, the master agreement set forth wage rates for only two categories of facilities — "Office Buildings" and "Industrial Establishments" — neither of which, as specifically defined in the agreement itself, appears to be involved in the instant case. It plainly appears, therefore, that the bargaining unit even as conceived by respondents themselves did not encompass employees engaged in maintaining residential apartment complexes. See also, R.-Tr. 75. At the very least, the Board could reasonably find, as it did, that the Parklabrea employees were sufficiently distinct so as to be entitled to decide for themselves whether to bargain separately with Kinney or as part of a city-wide unit — or, indeed, whether to bargain collectively at all. This fundamental Section 7 right to "bargain collectively through representatives of their own choosing * * *" was denied them in the instant case by respondents, who extended their agreement to cover these employees before any effort was made to persuade them that their interests would best be served by such a course.

As the Board properly concluded, a different result is not required by the fact that Kinney and others in the industry have customarily followed the practice of accreting newly-acquired job locations, for "Respondents have themselves recognized differences between Kinney's employees at Parklabrea and those at most of its other job locations by adopting a supplemental contract which made significant changes in the master agreement insofar as it applied to the Parklabrea employees." (Pl. 80). Moreover, the employees at 10 to 15 of Kinney's job locations are covered by supplemental contracts which modify wage and other provisions of the master agreement. As the Board observed (Pl. 81), "That fact greatly weakens the argument that lack of uniformity of wages and other benefits would bring chaos to the industry." The Company's related contention that the practice of accreting such units is more conducive to labor peace than the holding of elections in such units, finds no support either in logic or the case law; indeed, the "coup technique" employed in this case was bitterly opposed by a substantial minority of Parklabrea employees who felt that they had been deprived of their freedom of choice, and the result was a strike in protest against these tactics. Plainly, such action is more likely to generate industrial strife than avoid it, at least where, as here, the employees in question share common interests which set them apart to some extent from the larger group.

Equally without merit is the contention that the recognition clause of the parties' contract justifies their imposition of a bargaining representative on non-consenting employees who have a separate community of interest.¹⁴ See *N.L.R.B. v. Sunset House*, *supra*, 415 F.2d at 547; *Welch*

¹⁴ The master agreement between the Company and Local 399 provided in relevant part (R-X2D, p. 1):

(cont'd)

Scientific Co. v. N.L.R.B., 340 F.2d 199, 202-203 (C.A. 2, 1965); *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F.2d 35, 36 (C.A. 2, 1961). Plainly, an employer and union cannot by contract arrogate to themselves the authority to determine whether such employees are to be represented by the contracting union. *N.L.R.B. v. Sunset House, supra*, 415 F.2d at 548; *Local 620, Allied Industrial Workers of America v. N.L.R.B., supra*, 375 F.2d at 710. This decision rests with the employees themselves.¹⁵

Nor can respondents defend their actions in this case on the ground that they believed in good faith that Kinney's acquisition of the Parkla-brea operation amounted in law to an accretion. "It is well settled that prohibited conduct . . . cannot be justified on a good faith misunderstanding of what the applicable law is or how it is to be applied." *N.L.R.B. v. Bardahl Oil Co.*, 399 F.2d 365, 369-370 (C.A. 8, 1968), and cases there cited. See also *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 738-739 (1961); *N.L.R.B. v. Jan Power, Inc.*,

¹⁴ (cont'd)

WHEREAS, the Employer recognizes the Union as the sole collective bargaining agent for its employees within the industry within the area of Los Angeles and vicinity,

* * *

ARTICLE II – UNION RECOGNITION

Section 1. Scope of Bargaining Unit

- A. The Employer hereby recognizes the Union signatory hereto as the sole collective bargaining representative for all the employees coming under the classification of this Agreement and within the jurisdiction of each of the respective unions signatory hereto.

¹⁵ As this Court has recently stated in an analogous case: "An employer has no more right to shove his employees into a bona fide outside union that does not represent them than it has to shove them into a company union." *N.L.R.B. v. Finishline Industries Inc.*, F.2d , 79 LRRM 2007 (No. 71-1207 decided December 3, 1971).

421 F.2d 1058 F.2d 1063 (C.A. 9, 1970). The purpose of the statute is to protect employee rights, not to punish willful wrongdoers. An intent to violate the Act is not a prerequisite to finding that employee rights have been violated and must be restored by appropriate remedial action. *Welch Scientific Co. v. N.L.R.B.*, *supra*, 340 F.2d at 203. Although the Company suggests that its contract with Local 399 placed it on the horns of a dilemma since the contract required the Company to recognize Local 399 as bargaining representative of the Parklabrea employees, the contract itself does not in terms cover maintenance workers employed at residential facilities but appears to have contemplated that only office building and factory maintenance work were within its scope. In any event, any dilemma posed by the contract was of the Company's own making, for the Company was a signatory to the contract and must bear the consequences of having entered into an agreement the effect of which was to deprive newly-acquired employees of their self-organizational rights.

For all of the foregoing reasons, the Board properly found that the Parklabrea complex was not a mere accretion to an existing bargaining unit and that the Company and Local 399 violated Section 8(a)(3), (2) and (1) and Section 8(b)(2) and (1)(A), respectively, by treating it as such and by applying the union-recognition and union-security provisions of the master agreement to these employees. Cf. *N.L.R.B. v. Food Employers Council, Inc.*, *supra*, 399 F.2d at 504-505; *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1356-1358.

C. Substantial Evidence on the Whole Record Supports the Board's Finding that the Parklabrea Maintenance Employees were Coerced into Signing Cards for Union Membership on Behalf of Local 399

Respondents' contention that no unfair labor practice occurred on December 2, when the Company entered into an oral agreement with the

Local 399 on the terms of a contract covering the Parklabrea employees, is predicated upon its argument that the Parklabrea employees accreted to an existing unit. Since, as we have shown, the Board properly found that the Parklabrea employees were entitled to decide for themselves whether to be represented by Local 399, the Company and Union violated the Act on December 2 by reaching agreement on the terms of a contract covering these employees, none of whom had selected Local 399 as bargaining representative.

Respondents contend, in the alternative, that even absent a finding of accretion, the Company was entitled to recognize Local 399 on December 4 and 5, when a majority of the Parklabrea employees signed union cards and that the Company did not execute its contract with Local 399 until after those cards were signed. The short answer to this contention is that the execution of the contract on December 5 was the culmination of the oral agreement unlawfully reached on December 2, and as such was itself an unfair labor practice irrespective of any claimed majority status which happened to have been achieved in the interim.

In any event, the circumstances surrounding the signing of the authorization and checkoff cards on December 4 and 5 do not reflect the emergence of an uncoerced majority among the Parklabrea employees. Thus, the pre-employment packet of papers distributed by Company representatives on December 4 to the employees contained a notice which stated that continued employment with the Company was contingent upon membership in Local 399. To effectuate this goal, the Company, acting as an agent for Local 399, distributed authorization and checkoff cards, aided the employees in their completion, and collected said forms for transmittal to the Union. In addition, Company representatives distributed to the employees copies of the master contract and supplemental agreement between Kinney and Local 399, a designation-of-beneficiary form under the

Union's health and welfare fund, and various booklets and leaflets describing the health and pension plans of the Union. This evidence further supports the conclusion that the employees of Parklabrea were confronted, not with a realistic choice of representation, but with the accomplished fact of an existing contractual relationship between the Company and Local 399, which foreclosed any choice on their part. As the Trial Examiner properly concluded; "the Local 399 application and checkoff cards signed on and after December 4 by Parklabrea maintenance employees hired by Kinney did not reflect the free and untrammelled choice of the signers, and hence * * * Local 399 did not have a majority even at the time the supplemental contract was executed" (Pl. 82). See *International Ladies' Garment Workers' Union v. N.L.R.B.*, *supra*, 366 U.S. at 736; *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, *supra*, 362 U.S. at 413-414; *N.L.R.B. v. Jan Power, Inc.*, *supra*, 421 F.2d at 1063.¹⁶

Moreover, the Company's direct participation in Local 399's attempt to attain majority status not only tainted the majority upon which respondents ostensibly rely, but also constitutes a separate violation of Section 8(a)(2) and (1) of the Act, which makes it an unfair labor practice "to dominate or interfere with the formation or administration of any labor organization." As the Court of Appeals for the Second Circuit has put it: "Where supervisory personnel distribute union authorization cards

¹⁶ Approximately 130 of the Parklabrea employees attended the December 4 meeting at which the pre-employment packets were distributed. Although some of the Local 399 cards were filled out and given to Kinney after December 4, the Board properly inferred "either that such employees attended the December 4 meeting and received pre-employment packets containing the Notice and Local 399 cards, or that in the case of those who did not attend the meeting, Kinney followed a uniform hiring procedure and furnished such employees with packets identical with those distributed at the December 4 meeting, and hence that such employees were also subjected to unlawful coercion to join Local 399" (Pl. 82).

to employees and urge them to sign . . . it can hardly be said that the company was not supporting the formation of a labor union or interfering with the organizational rights of its employees . . .” *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 221 (C.A. 2, 1970), cert. den., 400 U.S. 833. Accord: *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 180-181 (C.A. 2, 1965). And as this Court concluded in a similar factual context, “the Board was entitled to infer coercion from conditions or circumstances which the employer [and union] created or for which [they were] fairly responsible and as a result of which it may reasonably be inferred that the employees did not have the complete and unfettered freedom of choice which the Act contemplates.” *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1357, quoting *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 534, 533 (1941). The Trial Examiner was therefore justified in concluding “that by distributing the misleading Notice and the Local 399 application and checkoff cards to Parklabrea maintenance employees on and after December 4, 1967, by accepting signed cards from such employees for transmittal to Local 399, and by checking off their dues thereafter, Kinney unlawfully assisted Local 399, in violation of Section 8(a)(1) and (2).” (Pl. 82).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS

The law is clear that employees who strike in response to their employer’s unfair labor practices are entitled to reinstatement at the end of the strike upon their unconditional application, even if they have been replaced, and even if their reinstatement requires that their replacements be discharged. *Mastro Plastic Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956). An employer who fails to reinstate such employees upon their unconditional request thereby violates Section 8(a)(3) and (1) of the Act. See

N.L.R.B. v. Kit Mfg. Co., 335 F.2d 166, 168-169 (C.A. 9, 1964), cert. denied, 380 U.S. 910; *San Antonio Machine & Supply Corp. v. N.L.R.B.*, 363 F.2d 633, 641 (C.A. 5, 1966).

The facts are uncontested that the strike in the instant case commenced on February 5, 1968, "in protest against Kinney's conduct in imposing Local 399" upon the Parklabrea maintenance employees as their bargaining representative (Pl. 83). Respondents also do not deny that the strikers unconditionally applied for return to their jobs, and that most of the strikers were denied reinstatement. The Company's sole defense is that the employees were not entitled to reinstatement because the strike did not constitute protected activity. The Company argues that the strike was not sanctioned by Local 399 and was violative of the partial no-strike clause contained in the master agreement with Local 399. But this argument assumes that the striking employees were in fact lawfully represented by Local 399, and that the employees were bound by the master contract, contentions which the Board found were without merit. In short, since the Company unlawfully extended recognition to and contracted with Local 399 at a time when it did not represent an uncoerced majority of employees in an appropriate unit, it follows that the employees who ceased work were engaged in an unfair labor practice strike. Accordingly, upon their unconditional application, these employees were entitled to reinstatement and the Company's admitted refusal to reinstate the returning strikers violated Section 8(a)(3) and (1) of the Act.

III. THE BOARD'S REIMBURSEMENT ORDER IS VALID AND PROPER

The Board properly ordered the Company and Local 399, jointly and severally, to reimburse the Parklabrea maintenance employees for

fees and dues unlawfully exacted from them under the union security agreement. On similar facts in two recent cases, this Court has upheld such an order as a reasonable exercise of the Board's broad remedial authority under Section 10(c) of the Act. *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1357-1358; *N.L.R.B. v. Jan-Power, Inc.*, *supra*, 421 F.2d at 1063-1064. Thus, in *Sheraton-Kauai*, the Court stated that it would enforce an order requiring reimbursement of fees and dues "where coercion is established either by direct evidence, or, as here, by inference from the fact that the employees joined the union after being informed that they were bound by a collective bargaining agreement containing a union security clause which conditions continuation of employment upon union membership." 429 F.2d at 1357. Indeed, such an inference of coerced union membership has been held a valid predicate for a Board order directing reimbursement of fees and dues in numerous cases. *N.L.R.B. v. Campbell Soup Co.*, 378 F.2d 259, 262 (C.A. 9, 1967), cert. denied, 389 U.S. 900; *N.L.R.B. v. Teamsters & Allied Workers, Local 996*, 313 F.2d 655, 660 (C.A. 9, 1963); *N.L.R.B. v. Seine & Line Fishermen's Union*, 374 F.2d 974, 982-983 (C.A. 9, 1967), cert. denied, 389 U.S. 913; *N.L.R.B. v. Revere Metal Art Co.*, *supra*, 280 F.2d at 100-101; *N.L.R.B. v. Getlan Iron Works, Inc.*, 377 F.2d 894, 896-897 (C.A. 2, 1967); *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 925, 928 (C.A. 6, 1964), enforcing 139 NLRB 1352, 1357 (1962); *N.L.R.B. v. General Drivers, Local 886, IBT*, 264 F.2d 21, 23 (C.A. 10, 1959); *N.L.R.B. v. Cadillac Wire Corp.*, 290 F.2d 261, 263 (C.A. 2, 1961).¹⁷

¹⁷ This Court also enforced a reimbursement order without comment in *N.L.R.B. v. Sunset House*, 415 F.2d 545, enforcing 167 NLRB 870 (1967).

In the present case, as shown, *supra*, the Parklabrea maintenance employees signed cards only after they were confronted by the Company with the accomplished fact that they were already covered by the existing collective bargaining agreement with Local 399, which included a clause requiring union membership as a condition of employment. Under these circumstances, an inference is warranted that those who signed cards did so under coercion; and “[t]he Board’s approach effectuates the policies of the Act, for it ‘returns to the employees what has been taken away from them to support an organization not of their free choice and places the burden upon the Company [and the Union] whose unfair labor practices brought about the situation.’” *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1358, quoting *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 541 (1943). And this remedy is appropriate “even though the employees who were coerced to pay the dues may have received some value therefore in the form of Union services.” *N.L.R.B. v. General Drivers, Local 886, IBT*, *supra*, 264 F.2d at 23.

It is, of course, possible that some employees would have voluntarily joined Local 399 on December 4 or 5 even in the absence of coercion but the burden in such cases is upon the parties guilty of misconduct to disentangle the consequences of their actions and show what would have happened absent the unfair labor practices. *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872 (C.A. 2, 1938), cert. denied, 304 U.S. 576; *N.L.R.B. v. Swinerton*, 202 F.2d 511, 516 (C.A. 9, 1953), cert. denied, 346 U.S. 814. That principle is plainly applicable here. As the Second Circuit observed, enforcing a dues reimbursement order, “For the courts to require a determination of the attitude of each employee in every case would impose impossible administrative burdens.” *N.L.R.B. v. Revere Metal Art. Co.*, *supra*, 280 F.2d at 101, quoted in *N.L.R.B. v.*

Jan Power, Inc., supra. See also *N.L.R.B. v. Teamsters & Allied Workers Local 996, supra*, 313 F.2d at 660. Accordingly, the Board reasonably inferred in the instant case that employees who joined Local 399 only after announcement of the union security agreement's application to them were motivated to do so, at least in part, by the unlawful compulsion of that agreement. And the Board's order properly directs reimbursement of fees and dues to employees so coerced. *N.L.R.B. v. Jan Power, Inc., supra*; *Sheraton-Kauai Corp. v. N.L.R.B., supra*.

The respondents relied heavily (in their briefs before the Board), upon *Intalco Aluminum Corp. v. N.L.R.B.*, 417 F.2d 36 (C.A. 9, 1969), in support of their contention that the Board's reimbursement order should not be enforced. But in that case the violation found was the employer's recognition of, and execution of a contract with, a minority union after a card check by a representative of the State Labor Department had certified its majority status. In fact, and unknown to the company, a significant number of the card signers had revoked their cards, thereby destroying the union's apparent majority (417 F.2d 40). Unfair labor practice charges were filed only against the company, and only it was named in the complaint; no charges were filed against the union involved in that case (*Intalco Aluminum Corp.*, 169 NLRB 1034 (1968), 67 LRRM 1316). This Court refused to enforce the provision of the Board's order directing reimbursement of dues and fees because the employer had acted in good faith and because the order failed to distinguish between those employees who had joined the union voluntarily and those who did so under compulsion of the union security agreement (417 F.2d 41).¹⁸

¹⁸ Sharply distinguishable from the present case are *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 653-654 (1961), and *Morrison-Knudsen Co.* (cont'd)

In *Sheraton-Kauai*, however, this Court held (429 F.2d at 1358, n. 6):

Our decision in *Intalco Aluminum Corp. v. N.L.R.B.*, 417 F.2d 36 (9th Cir. 1969), refusing to enforce the reimbursement provisions of a Board order, can be reconciled with our subsequent decision in *N.L.R.B. v. Jan Power, Inc.*, 421 F.2d 1058 (9th Cir. 1970), **only by restricting the earlier decision to its facts** — that is, to a case in which prior to the time the collective bargaining agreement was extended to the new employees, the employer had a good faith belief that a majority of the employees had chosen to be represented by the union.

It is therefore readily apparent that the instant case is governed by the holdings in *Jan Power* and *Sheraton Kauai*, not *Intalco*. In the instant case the employer clearly did not entertain a good faith belief that the Parklabrea employees had chosen to be represented by Local 399 before the collective bargaining agreement was extended to said employees, for here the employees joined Local 399 only after they were informed by their new employer of the union security agreement and its application to them. Where, as here, employees are in substance told by the employer that their continued employment depends on their joining the union,

¹⁸ (Cont'd) *v. N.L.R.B.*, 276 F.2d 63, 73-76 (C.A. 9, 1960), where broad reimbursement orders were denied enforcement for lack of evidence that union membership was attributable to coercion. In *Local 60*, the inference of coerced union membership was rejected because all employees were union members before they were hired and before any unfair labor practices had been committed. In *Morrison-Knudsen*, the union was already the lawfully recognized majority representative when the unfair labor practices occurred, and the finding of coercion was sustained only with respect to five employees as to whom the reimbursement order was enforced. For cases distinguishing these holdings, see *N.L.R.B. v. Teamsters & Allied Workers, Local 996*, *supra*, 313 F.2d at 660; *N.L.R.B. v. Revere Metal Art Co.*, 280 F.2d at 100-101; *N.L.R.B. v. Jan Power, Inc.*, *supra*.

the employer cannot escape liability for payments made to the union by employees who then sign applications for union membership. In short, the Company and Local 399 chose to bring the Parklabrea maintenance employees into the latter's fold by contract rather than lawful persuasion. In doing so, they acted at their own peril and are properly chargeable with remedying the consequences of their actions.

For these reasons, the Board acted within its discretion in imposing joint and several liability for reimbursement of fees and dues paid under this unlawful compulsion. *N.L.R.B. v. Campbell Soup Co.*, *supra*, 378 F.2d at 262; *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1357-1358.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the application for enforcement in Case No. 71-2603 be granted in full, and that the petition for review in Case No. 71-2699 should be denied.

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February 1972.

APR 1972

No. 71-2699 and 71-2603

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 71-2699

KINNEY NATIONAL MAINTENANCE SERVICES, a Division of Western Building Maintenance Company,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 71-2603

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

KINNEY NATIONAL MAINTENANCE SERVICES, a Division of Western Building Maintenance Company Service, and MAINTENANCE EMPLOYEES UNION, LOCAL 399, BUILDING SERVICE EMPLOYEES INTERNATIONAL, UNION, AFL-CIO,

Respondents.

On Application for Petition to Review, and Application for Enforcement of an Order of the National Labor Relations Board.

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No. 71-2699 and 71-2603

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 71-2699

KINNEY NATIONAL MAINTENANCE SERVICES, a Division of Western Building Maintenance Company,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 71-2603

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

KINNEY NATIONAL MAINTENANCE SERVICES, a Division of Western Building Maintenance Company Service, and MAINTENANCE EMPLOYEES UNION, LOCAL 399, BUILDING SERVICE EMPLOYEES INTERNATIONAL, UNION, AFL-CIO,

Respondents.

On Application for Petition to Review, and Application for Enforcement of an Order of the National Labor Relations Board.

Consolidated Brief for Kinney National Maintenance Services, a Division of Western Building Maintenance Company.

STATEMENT OF THE ISSUE.

Whether the Board may penalize an employer signatory to a master collective bargaining contract by requiring the employer to reimburse employees for dues,

all of which were remitted to a union, when the employer believed in good faith that the union represented its employees; when the employees uninterruptedly enjoyed all of the rights and benefits (insurance, health, disability coverage, pension, etc.) purchased by dues payments; and when the same employees subsequently ratified representation by the union by electing the union as their certified collective bargaining representative so as to continue uninterruptedly representation by the union and dues payments to the union?

JURISDICTION.

This case is before the Court upon the petition of Kinney National Maintenance Services, Inc., a Division of Western Maintenance Company (hereinafter referred to as "Kinney"), to review and set aside an order of the National Labor Relations Board (hereinafter referred to as the "Board"), issued against Kinney on June 30, 1969, following proceedings under Section 10(c) of the National Labor Relations Act (hereinafter referred to as the "Act"), and the petition of the Board for enforcement of the same order. The petition of Kinney to review and set aside the order and the petition of the Board to enforce the order have been consolidated for purposes of filing briefs. This Court has jurisdiction over the proceedings pursuant to Section 10(f) of the Act, since the alleged unfair labor practices occurred in Los Angeles, California within the judicial district where Kinney is engaged in business.

STATEMENT OF THE CASE.

I.

THE KINNEY OPERATION AND ITS RELATIONSHIP WITH LOCAL 399.

A. Kinney Has Extensive Experience in the Maintenance Industry and Has Always Operated as an Intergrated Unit.

1. Kinney's Geographical Operation.

Kinney is engaged in the building cleaning and maintenance business, servicing commercial and residential buildings, principally in the Los Angeles Metropolitan Area [Tr. 5-6; 48-49].¹ Along with its corporate predecessors, Kinney has been so engaged for at least 25 years [R. Tr. 46]. Kinney has approximately 1,800 building, cleaning and maintenance employees, exclusive of clerical and administrative employees. These employees service approximately 600 job locations in the Los Angeles Metropolitan Area and provide these locations with cleaning, grounds keeping and light handyman services [R. Tr. 39-47; 62-63]. Over 90 percent of Kinney's job sites are within a 10-mile radius of each other [R. Tr. 45; 69-70].²

¹References designated "Tr." are references to the transcript of testimony. References designated "R. Tr." refer to the transcript in the representation case heard below. "Pl." refers to the documents designated as "Volume I Pleadings" and filed with the Court.

²Many of Kinney's principal jobs are within a few blocks of Park LaBrea. For example, Century City East is a fourteen story office building at Century City, a developing residential and commercial complex. Approximately twenty-five full-time Kinney employees perform full-time cleaning services at that location [Tr. 86]. At Wilshire Comstock Apartments, a tower type apartment development consisting of two twenty story buildings, approximately twelve to fifteen full-time Kinney employees perform cleaning, groundskeeping and light repair services. Kinney has

(This footnote is continued on next page)

2. Kinney's Functional Operation.

Kinney has always operated as a single, integrated entity [R. Tr. 38]. Kinney has always had a common management, common centralized administrative services, single payroll department, one controller, one office manager, one headquarters, and one chief executive officer and general manager who sets all policies and who oversees their implementation [R. Tr. 37-39]. All of Kinney's labor policies are set by its president who exercises direct supervisory control over all Kinney employees [R. Tr. 39-40]. Kinney has a policy of interchangeability of employees from job site to job site depending upon an analysis of the need for additional employees and the availability of employees to fill the need [R. Tr. 44].³

other jobs at various Bank of America and Crocker-Citizens Bank locations as well as at Union Oil Refinery and the Pacific Indemnity Building where their employees perform groundskeeping, polishing and handyman services [Tr. 93-94]. Other comparable job locations in the immediate area are at CBS Television City, The Forum and International Airport. One location involves more Kinney employees than Park LaBrea and another covers a *larger* geographic area. However, all of the locations are close to Park LaBrea, and the work involves employees performing the same jobs and using the same skills as at Park LaBrea [Tr. 98-102, 108-111, 140-143].

³Because of the substantial similarity of work performed by Kinney at all of its job locations and the terms and conditions of employment, Kinney employees are functionally interchangeable. All of the locations are organized and operated on essentially the same bases and employees employ their skills interchangeably at the various locations. Employees are, in fact, transferred to various job sites from day to day as operating requirements dictate. When a job at a new site, having no previous maintenance employees, is obtained, it is staffed with employees from other Kinney jobs [Tr. 125]. Experienced Kinney employees would commonly be transferred to new job starts already having employees to provide an experienced base for growth [R. Tr. 44-45]. Similarly, surplus employees from one location would be transferred to another location. Thus, after Kinney took over Park LaBrea, it initially determined it could have at least a five percent reduction in the work force [Tr. 112]. Normally, such employees would

B. For Over 25 Years Kinney Has Been a Party to a Master Collective Bargaining Agreement With Local 399 Providing for the Application of the Contract to Each New Job Obtained by Kinney.

Kinney and its predecessor corporations have, at least since 1946, been parties to collective bargaining agreements with Local 399 as the sole bargaining representative of Kinney employees [R. Tr. 46-49]. All building maintenance work performed by Kinney has been subject to these agreements. Each of these agreements has always provided that the agreement shall be applied to each new job start of Kinney and, in fact, the agreements have been applied to each new job start obtained by Kinney [R. Tr. 45-49]. Approximately 95 percent of all new job starts of Kinney, including apartment houses, have been covered by the provisions of the then existing basic collective bargaining agreement without change [R. Tr. 54; 64]. As to the balance, when specific requirements of particular job locations, including new apartment house jobs, require, Kinney has traditionally entered into supplements to the basic collective bargaining agreement [R. Tr. 54; 64].

The agreement which is the subject of this action was entered into between Kinney and Local 399 as of August 1, 1966, and was to expire on February 28, 1969 [R. Tr. 29]. This agreement, as all of its predecessors, expressly provided for application of its provisions to all new Kinney locations.

be transferred to other Kinney locations, if for no other reason than to minimize claims on unemployment insurance reserves. Additionally, Kinney employees at Park LaBrea and other locations will be transferred to and from Park LaBrea because of promotions and employee job preferences.

II.

KINNEY WAS AWARE OF THE PREVAILING INDUSTRY-WIDE PRACTICE OF COLLECTIVE BARGAINING AGREEMENTS WITH ACCRETION PROVISIONS AND OF THE EMPLOYERS' AND EMPLOYEES' NEEDS FOR SUCH AGREEMENTS.

A. The Entire Building and Maintenance Industry Has Historically Entered Into Master Agreements With Accretion Provisions.

Kenney was not only a party to several master collective bargaining agreements with Local 399, all of which contained an accretion clause, but, because of the closeness of its general manager, Jay Raskin, to labor-management relationships in the maintenance industry, it was also aware that these master agreements with Local 399 were uniformly accepted in the industry and that unless master contracts with accretion provisions were followed, unionization could not survive and employees would not be protected in their wages and working conditions. Mr. Raskin had been an executive in the building, cleaning, and maintenance business for more than 20 years and had been the president of Kinney and a predecessor corporation for almost 6 years [R. Tr. 31-33].

As conceded by the parties, Mr. Raskin is an expert in labor relation matters in the building, cleaning and maintenance industry, having acted as chief spokesman for the service and maintenance industry in negotiations with unions, including Local 399, for many years [R. Tr. 35-36]. Mr. Raskin had been the employer representative in the negotiation of the preceding five standard maintenance contractors' agreements with Local 399, covering the preceding 17 years [R. Tr. 36; 74].

This bargaining group represents the 15 major building maintenance companies in the Southern California Area, having a combined work force of three to five thousand employees working on four to five thousand job locations [Tr. 120-121]. During at least the last 17 years each of the standard collective bargaining agreements has provided for application to all new employer job starts. The uniform practice of all the employers, and Local 399 throughout this period, has been to apply the collective bargaining agreement to each new job start [R. Tr. 74-77; R. Tr. 103-107].

As Mr. Raskin testified, not only were these collective bargaining agreements with accretion provisions a long-standing tradition in the industry, but without accretion, there would be chaos in the industry, a fact recognized equally by employers and employees alike [Tr. 119-131].

B. Employees and Employers Have Recognized the Need for Collective Bargaining Agreements With Accretion Provisions.

The uniform industry practice of collective bargaining agreements with accretion clauses developed in response to the special characteristics and requirements of the building maintenance industry. The industry is extremely competitive because entry into the business involves very little capital investment. The principal employer expense is the cost of labor. The employees in the industry are generally unskilled and no extensive training program is involved. Because of these factors, price competition is intense. As a result, each company in the industry is subject to rapid change in job locations because of price competition, as well as customer dissatisfaction [Tr. 123-128].

The application of the accretion doctrine to a new job location having unrepresented employees has helped to promote stable employment relations. An employer bidding on a job must know his wage costs, as well as what the other conditions of employment will be, in order to determine his contract price. When the employer is able to apply a contract to a new job site, he can know what his costs and other terms and conditions of employment will be on the job even though the employees on the job are unrepresented. Conversely, if accretion were not to apply, an employer about to bid or take over a job has no ability to establish what his wages and other conditions of employment will be on the job. In order to obtain the certainty which the operation of his business requires, the employer will be forced to bring in his own crew rather than hire the existing employees on the new job.

Without the stability brought about by application of the accretion doctrine in the circumstances here present, the employees in the industry would be in a far less secure position. Each job location would require a separate election, a certification, and collective bargaining for that job location. Additionally, in many cases, employees would continue to be unrepresented because of the high cost of organizing each location; the time that would pass in the event of elections and contests between unions, as well as turnover in job locations. Further, the bargaining power of a small group of unskilled employees at any one job location, would be greatly limited, particularly in light of the low level of employee skills, interchangeability of employees and the transitory nature of job sites. Application of the accretion doctrine has avoided these problems [Tr. 53; 119-120].

Faced with no security or bargaining leverage when dealing with individual employers who had no problem in hiring new employees, employees have fought for, and won, the right to enter into master agreements providing for accretion with building maintenance employers. The employees' satisfaction with this system is evidenced by the fact that there has not been a strike over a contract or contract negotiations since at least 1950. All labor relations in the industry have been stable [Tr. 119, 129].

III.

KINNEY UNDERSTOOD THE PARK LABREA TO BE A NEW JOB SITE TO WHICH THE AGREEMENT WITH LOCAL 399 APPLIED AND KINNEY, IN GOOD FAITH, APPLIED THE LOCAL 399 AGREEMENT TO PARK LABREA.

A. Park LaBrea Was Thought to Be a Suitable Site for the Application of the Agreement Between Local 399 and Kinney.

Hundreds of times in the past Kinney had applied collective bargaining agreements with Local 399 to variable job sites at geographically disparate locations all throughout Southern California. When Kinney contracted for the Park LaBrea job it was contractually obligated to extend the Local 399 agreement to Park LaBrea. Furthermore, a comparison (i) of the service needs of Park LaBrea with the services typically provided by Kinney, (ii) the working conditions at Park LaBrea and other Kinney job locations, and (iii) the proximity of Park LaBrea to other Kinney sites reasonably caused Kinney to believe that Park LaBrea was a logical site for application of the Local 399 agreement.

1. The Services Required at the Park LaBrea Are Those Typically Supplied by Kinney.

At all of Kinney's job sites, including apartment complexes, the services which it provides are basically cleaning, grounds keeping, and light repair work [R. Tr. 40-41; 65-66]. The janitor classification performs such services as sweeping the floors, hauling of trash, burning of trash, waxing the floors, mopping and other comparable cleaning functions using cleaning equipment such as brooms, brushes, mops, vacuums and waxing equipment [R. Tr. 40; 65]. Ground-keepers trim hedges, fertilize plants and water [R. Tr. 41; 66]. Light repairmen do light carpentry, correct minor electrical malfunctions, and do sprinkler repairs [R. Tr. 41]. When Kinney analyzed the maintenance needs of Park LaBrea it discovered that the historical and present service needs of Park LaBrea were for exactly the types of services, requiring identical skills and equipment (janitorial, grounds keeping, and light utility), which Kinney always provided to all of its clients, including its apartment complex locations [R. Tr. 41; 43; 65; 114-116]. When Kinney assumed maintenance operations, the services which Kinney had already supplied and which traditionally had been supplied at the Park LaBrea, continued to be supplied by Kinney [R. 114-116].

2. The Working Conditions at the Park LaBrea Are the Same as Those at Kinney's Other Locations.

Additionally, Kinney discovered that the working conditions of the employees at Park LaBrea were also identical to the working conditions at Kinney's hundreds of other locations [R. Tr. 43-44]. Substantially the same fringe benefits are available to Kinney employees at all of its job locations [R. Tr. 41-43].

3. Park LaBrea Is at the Geographical Center of Kinney's Operations.

At least 90 percent of Kinney's job locations are within a 10-mile radius of Park LaBrea; most of Kinney's principal jobs are within a few blocks of Park LaBrea [R. Tr. 45; 69-70]. This made Park LaBrea a particularly inviting site for job acquisition and for application of the master agreement because of Kinney's policy of interchanging employees as operating requirements dictate [Tr. 108-112; 125].

B. Kinney and Local 399 Negotiate a Contract Giving to the Employees Conditions Superior to Those Prevailing in the Industry and Invites the Park LaBrea Employees to Join Local 399.

1. A Supplemental Agreement Protecting Park LaBrea Employees Is Executed.

When Kinney decided to contract for the Park LaBrea site it, as always, so advised Local 399. Sometime prior to December 4, 1967, discussions were held between Kinney and Local 399 [R. Tr. 55]. It was eventually agreed that the employees of the Park LaBrea were not only entitled to the benefits gained by coverage under the master collective bargaining agreement, but also that none of their accrued benefits should be lost or jeopardized by the application of the master agreement to Park LaBrea. The supplemental agreement eventually reached protected gains previously made by the Park LaBrea employees by giving to them slightly higher wage rates than those prevailing in the industry by virtue of the master agreement, plus an additional paid holiday [R. Tr. 46-47].

2. Kinney Invites the Employees to Become Employees of Kinney.

On December 4, 1967, Metropolitan Life Insurance Company called a meeting of all Park LaBrea service and maintenance employees. Approximately 130 out of the 150 employees attended the meeting. Metropolitan advised the employees that as of December 5, 1967, Kinney would assume performance of the building services and maintenance services at Park LaBrea. Jay Raskin was called upon to address the meeting. Raskin introduced himself and the other representatives of Kinney and gave a brief summary of Kinney's history and the place it held in the building service and maintenance industry. He explained to the employees the benefit which Kinney gave to its employees and advised the gathering that if any of the prior employees of Metropolitan desired to work for Kinney at the Park LaBrea they were invited to do so and that their employment would commence on December 5, if they should decide to accept Kinney's employment invitation. Various brochures describing Kinney and the terms of employment and application forms for employment with Kinney were made available to the employees. Literature relating to Local 399 was also made available to employees. Approximately 95 employees signed Local 399 applications for membership at the meeting. Another 29 applications for membership were signed the next day, December 5, 1967 [R. Tr. 92-99].

3. Dues Are Transmitted to Local 399.

In conformity with its long-standing practice, Kinney transmitted the membership applications and check-off cards to Local 399. Pursuant to the industry practice and in conformity with the master collective bargaining agreement, Kinney acted as a conduit in the collection of dues by deducting dues from the employees' wages which were then paid over immediately to Local 399 [Tr. 72]. Accordingly, those employees of Kinney at Park LaBrea who had dues deducted received the benefits accorded to them as members of Local 399. Among other things, those benefits included life insurance, disability insurance, health care and pension plan contributions. In addition, of course, those employees received the other customary benefits of a collective bargaining agreement, including contractual wages and working conditions and representation by the union in disputes with the employer. Kinney retained no part of the dues withheld and received no monetary benefit from its employees' membership in Local 399 [Tr. 72].

While there had been no attempt to organize the Park LaBrea employees during the time of the anticipated takeover of the building and maintenance function by Kinney, shortly after the takeover, a sole employee who was a member of Local 986 proselytized approximately 20 other employees in seeking to upset the Kinney-Local 399 collective bargaining agreement [Tr. 313]. Meetings were held by Local 986 representatives wherein the 150 employees of Park LaBrea were invited [Tr. 165; 168]. Finally, on February 5, 1968, approximately 35 to 40 of Kinney's employees struck the Park LaBrea. Subsequently, substantially all the employees abandoned the strike and were re-employed by Kinney [Tr. 73-74].

IV.

COMPLIANCE WITH THE BOARD'S ORDER.

On June 30, 1969, the Board issued its decision and order finding that Kinney had violated Sections 8(a) (1), (2) and (3) of the Act and ordering, among other things, that Kinney jointly and severally with Local 399 reimburse its employees at Park LaBrea for all union dues from those employees which had been withheld by Kinney and transmitted to Local 399 [Pl. 128-131]. The Board's decision and order was transmitted to Region 31 for enforcement. As of this time, Kinney has acted to comply in full with the Board's decision and order in all respects, except for the part of the decision and order directing Kinney to, jointly and severally with Local 399, reimburse all of its maintenance employees for dues paid. Among the steps taken by Kinney to comply with the Board's decision and order was to offer to 25 named employees immediate and full reinstatement of their jobs and payment for all back earnings lost as a result of the alleged discrimination. Back pay has been paid to 23 of the 25 employees and compensation has been offered to the 2 remaining employees who have refused to accept the offer.

V.

THE BOARD ORDERS A REPRESENTATION ELECTION AT PARK LABREA AND LOCAL 399 IS CHOSEN AS THE COLLECTIVE BARGAINING REPRESENTATIVE OF THE EMPLOYEES PURSUANT TO A BOARD-CONDUCTED ELECTION.

After the Board's order and decision, employees of the Park LaBrea indicated to all parties to these proceedings that a majority of their number had wanted to be represented by Local 399 at the time of the

Kinney takeover and still desired to be represented by Local 399. Thereafter, pursuant to a stipulation of the parties to these proceedings, accepted by the Board, the Board directed the Regional Director for Region 31 to conduct a representation election among Kinney's employees at Park LaBrea. In May, 1969, Region 31 conducted an election to determine who would thereafter be certified as the collective bargaining representative of Kinney's employees at Park LaBrea; both Local 399 and Local 986 appeared on the ballot. Local 399 won the election and pursuant to the results of that election on June 13, 1969, Local 399 was certified as the exclusive bargaining representative of Kinney's employees at Park LaBrea.

Thereafter, the same terms and conditions of employment applied, the same dues and other charges were withheld and remitted to Local 399, and the same life insurance, disability pension and other benefits continued to accrue to Kinney's employees at Park LaBrea who were members of Local 399 as had been the case under the initial application of the master agreement.

DISCUSSION.

I.

THE APPLICABLE PRINCIPLES.

The Supreme Court has repeatedly held that to be constitutionally permissible, an order by the NLRB may not be in the nature of penalty but must be limited solely to curing the results of an unfair labor practice.

“The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.

“We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.”

Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 11, (1940); See also, *Local 60, Carpenters v. N.L.R.B.*, 365 U.S. 651, 655 (1961); *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 236 (1948).

It is clear that each case must be decided on its own facts. See *Republic Steel* and *Local 60*, *supra*; *Building Material Teamsters v. N.L.R.B.*, 275 F.2d 909, 913 (C.A. 2, 1960) (“the validity of reimbursement orders necessarily depends upon the peculiar circumstances of each particular case.”)

In determining whether an order requiring dues reimbursement is remedial or punitive, the courts have considered the cumulative effect of the following factors:

1. *Whether the employer had a good faith and reasonable belief that no unfair labor practice was being*

committed or whether he was motivated by anti-union animus.

As stated in *Ladies Garment Workers v. N.L.R.B.*, 366 U.S. 731, 740 (1961):

“Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding. If he is found to have erred in extending or withholding recognition, he is subject *only* to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. No further penalty results.”

See also, *Intalco Aluminum Corporation v. N.L.R.B.*, 417 F.2d 36, 41 (C.A. 9, 1969) wherein in refusing to enforce a dues reimbursement order, the court noted:

“[T]he Examiner and Board found an absence of bad faith on the part of petitioner. It is not a case where the company actively cooperated with the union in carrying out a clearly unlawful contract provision. There is no suggestion of anti-union bias or action.”

Accord:

N.L.R.B. v. Masters-Lake Success, Inc., 287 F. 2d 35 (C.A. 2, 1961).

2. *The benefits accruing to the employees as a result of their dues payments.*

Whether the employees received the benefits of union representation is an element to be considered in evaluating the legality of a reimbursement order. *Local 60, Carpenters, supra*; *Intalco Aluminum Corporation v.*

N.L.R.B., supra; Kresge Dept. Stores, 77 N.L.R.B. 212 (1948).

3. *Whether the employees desired union affiliation.*

Where the employees, or some of them, have evidenced, either prior to or subsequent to recognition, their desire for union affiliation, reimbursement is to be denied as an unwarranted enrichment. *Morrison-Knudsen Co. v. N.L.R.B.*, 276 F.2d 63 (C.A. 9, 1960); *N.L.R.B. v. American Dredging Co.*, 276 F.2d 286 (C.A. 3, 1960); *Intalco Aluminum Corporation, supra; N.L.R.B. v. Englander Co.*, 237 F.2d 599 (C.A. 3, 1956); *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583 (C.A. 2, 1961); *N.L.R.B. v. Masters-Lake Success, Inc., supra*.

4. *Whether the employees have subsequent to the unfair labor practice indicated their desire to enjoy the benefits of a collective bargaining agreement by ratifying the actions found to be illegal.*

Where a subsequent election resulted in certification of the subject union, the original recognition has been ratified and dues reimbursement is to be denied.

N.L.R.B. v. Englander Co., supra (Board ordered dues reimbursement because of recognition of minority union and coercion of employees into joining; thereafter, election held and "minority union" certified—Court refused reimbursement under these circumstances).

N.L.R.B. v. Marcus Trucking Co., supra (Employer recognized a new union at time obligated to recognize principal union agreement under contract bar. Because of order of subsequent election and voluntariness—denial of reimbursement).

5. *Whether the employer enjoyed the benefits of the allegedly unlawfully collected dues.*

Where the employer receives no advantage from dues payments by way of rebate or retention of dues, a reimbursement order is considered to be punitive.

Morrison-Knudsen Co. v. N.L.R.B., *supra* (“We think the remedy is unfair. The order requires the employers, who at most received indirect financial benefit from the unlawful practices, to pay back all of the dues.”) *N.L.R.B. v. U.S. Truck Co., Inc.*, 124 F.2d 887 (C.A. 6, 1942) (We think that the order compelling the employer to restore dues not retained by it for its own benefit, but turned over to representatives of the employees, is punitive and not corrective.”)

6. *Whether the employer was the ultimate recipient of the dues or rather a conduit for the collection of dues.*

A dues reimbursement order is in the nature of a constructive trust and the order follows and may only be imposed upon the *res*.

Hughes & Hatcher, Inc. v. N.L.R.B., 393 F.2d 557 (C.A. 6, 1968) (Where dues checked off and remitted to union—“only order may be against union; to charge employer is a penalty”);

N.L.R.B. v. U.S. Trucking Co., Inc., *supra*, at page 19, (same).

N.L.R.B. v. Halben Chemical Co., 279 F.2d 189, 192 (C.A. 2, 1960) (To require an employer “to reimburse all its employees for sums paid by them to the union is oppressive and therefore not calculated to effectuate a policy of the Act.”).

N.L.R.B. v. Mears Coal, 437 F.2d 502 (C.A. 3, 1970) (Even if no charge filed against union, employer not liable as conduit and therefore no reimbursement to employees).

See also, *N.L.R.B. v. Sucrest Corp.*, 409 F.2d 765 (C.A. 2, 1969) (union primarily liable; employer secondarily liable).

Morrison-Knudsen v. N.L.R.B., *supra*, at page 18.

N.L.R.B. v. U. S. Truck Co., Inc., *supra*, at page 19.

In those cases where a reimbursement of dues order has been affirmed, the following reasons have been offered for requiring the dues reimbursement:

1. Even though the employees paying dues may have received benefits, those benefits may not have been desired by the employees; and

2. If desired, the employees may nevertheless have chosen to have received them from a different collective bargaining representative; and

3. Since the collective bargaining agreement is no longer enforceable, the employees may lose credit for all of the retirement, disability and other benefits previously afforded to them and perhaps, therefore, should not be required to pay anything for those abruptly terminated benefits.

Given the facts in the instant case, to impose upon Kinney the burden of dues reimbursement would constitute a penalty without remedial benefits to the em-

ployees.⁴ None of the considerations enunciated by the courts in requiring reimbursement are present; conversely, all of the factors mediating against reimbursement imposition are in operation.

⁴Unless reimbursement bears a rational relationship to the employee loss, an order of reimbursement constitutes a penalty. This is true even if the evidence only shows that it is possible that a majority of the employees were willing to pay dues for union membership and the only possibility of employees' loss is the chance that they may have lost their option to choose freely whether or not to join or remain a union member. In such an instance, an order for dues reimbursement lacks rational relationship to the deprivation because there is no accurate means to ascertain an amount allocable to the employees' loss of their freedom of choice. As stated in Justice Harlan's concurring opinion in *Local 60, Carpenters v. N.L.R.B.*, *supra*:

"I think the Board should be denied the use of its Brown-Olds remedy in situations where, as here, it is not unlikely that a substantial number of employees were willing to pay dues for union membership because, as I see it, the amount of dues or other exactions paid is not a tenable way of estimating the value a willing union member would place on his right to choose freely whether or not he would be or remain a union member—as it were, on his right to change his mind. The amount of dues paid does perhaps provide a means of estimating the value of benefits received from the union. Or the amount of dues paid does perhaps measure the cost coercion imposes upon an employee who, if free to choose, would be unwilling to join the union (although even in this case a proper adjustment might have to take some account of the union benefits the employee would not have received had he been merely a nonunion employee in a unionized bargaining unit). But I can find no rational relationship at all between the amount of dues paid and the value an employee, who is willing to join a union, would place on his freedom to change his mind."

"For example, an employee may be more willing to join a union which charges high dues and provides substantial benefits than a union which charges little and give little. But the Board formula declares that in the case where the dues are higher the value of the loss of freedom of choice is greater." 365 U.S. at 659.

Of course, here the employees expressed their collective bargaining representative choice by the most dramatic method—a Board supervised election.

II.

KINNEY, IN GOOD FAITH, BELIEVED THAT IT WAS OBLIGATED TO APPLY THE MASTER COLLECTIVE BARGAINING AGREEMENT WITH LOCAL 399 TO THE PARK LABREA SITE, AND DID SO WITHOUT ANTI-UNION MOTIVATION.

It is conceded that Kinney, in good faith, believed itself bound by the express terms of its collective bargaining agreement with Local 399 to recognize Local 399 as the collective bargaining representative of its employees at Park LaBrea. This belief was consistent with the express provisions of that agreement and the long-standing practice of Kinney in extending this agreement to all of its new operations—a practice shared by all of the organized members of the building maintenance industry in Southern California.

Nor could Kinney be reasonably expected to anticipate or suspect the illegality of extending the collective bargaining agreement to a new job site because, based upon the experience of Jay Raskin, it was assumed that the standard policy of accreting new job sites was the only way in which the persons employed in the industry could have reasonable job security. The lack of any attack on this standard policy prior to this case and the complete absence of any employee discontent with the master collective bargaining agreement, only solidified for Kinney and its management their belief in the legality of extending the master collective bargaining agreement to Park LaBrea.

No benefit accrued to Kinney from the extension of the agreement to Park LaBrea. In fact, wages and all other tangible benefits being equal, Kinney lost money by having to extend the agreement because of the additional administrative and personnel costs in-

curred by having to deal with the union. Kinney's only motive in applying Local 399's collective bargaining agreement to its new job location at Park LaBrea was its unquestionably honest belief that it was contractually and legally obligated to do so.

Subsequent to the issuance of the Board's decision and order, Kinney has sought to comply with the Board's decision and order in every respect except as to the reimbursement directive which is the subject of this Petition. Having recognized that what it had done in the past and what had always been done by the entire organized building maintenance industry in Southern California was illegal, Kinney quickly sought to remedy any employee loss caused by its actions and has not, and certainly will not, repeat the conduct proscribed by the Board's decision and order.

III.

THE EMPLOYEES RATIFIED THE RECOGNITION OF LOCAL 399 AND THEIR BENEFITS CONTINUED UNINTERRUPTEDLY; TO REQUIRE DUES REIMBURSEMENT WOULD PROMOTE A WINDFALL TO EMPLOYEES AND IMPOSE A PENALTY UPON KINNEY.

A. The Employees With Full Knowledge Ratified Their Support for Local 399.

All of the employees who were employed at Park LaBrea at the time of Kinney's takeover were eligible to vote in the subsequent election. The results of the election show that Kinney's employees at Park LaBrea did want Local 399 as their collective bargaining representative. At this Board-supervised election the employees were fully informed of their rights to select a union of their own choice, were fully aware of the

charges that had been leveled against Local 399 and Kinney and the results thereof, and with full knowledge affirmed their previous support for Local 399. The vote of Kinney's employees at Park LaBrea in favor of Local 399, when these same employees were already fully aware of the terms of the collective bargaining agreement that would apply, makes it clear that Kinney's employees both wanted the benefits to be gained from a collective bargaining agreement with Local 399, desired protection for the benefits previously gained, and were willing to pay the dues and other charges required to obtain representation by Local 399.

B. The Employees Uninterruptedly Enjoyed the Benefits of the Local 399 Agreement.

Because of the unique circumstances of this proceeding, the terms and conditions of the collective bargaining agreement originally entered into between Local 399 and Kinney have continuously been given full force and effect. Kinney's employees at Park LaBrea have, therefore, received the uninterrupted benefit of that collective bargaining agreement from the time it was first executed to this time.

Prior to the election, Kinney's employees at Park LaBrea received, in good faith, the full benefits they were entitled to under the terms of Kinney's collective bargaining agreement with Local 399, including insurance and health benefits which were taken advantage of by some of the employees. Subsequent to the election, because of the results of the election, Kinney's employees continued to pay the very same dues and continued to receive the very same benefits originally extended to them under Kinney's already existing collective bargaining agreement with Local 399.

C. To Grant Reimbursement Would Create an Economic Windfall for the Employees.

If the Board's order is enforced, the employees of Kinney, rather than obtaining nothing for their dues payments, are to be repaid their prior dues payments though the employees have received the benefits paid for by these dues payments, will receive free that which they have already agreed they both want and are willing to pay for. Such an order is inconsistent with those cases which have considered the issue of reimbursement after the employees have later ratified or otherwise indicated their choice to receive the benefits obtained.

For example, in *N.L.R.B. v. Englander Co.*, *supra*, at page 18, the Board found that an employer had wrongfully supported a union and had coerced certain employees into joining it. The Board ordered the company to cease and desist from interfering with union affairs and to reimburse dues deducted from the wages of the employees (114 *N.L.R.B.* 1034, 1047 (1955)). Thereafter, an election was held and the union in question was certified as the bargaining agent for the employees. The court held that because of the election, reimbursement of dues was no longer proper and the court saw "no equity or advantage to be gained at this stage in ordering the company to pay back dues checked on behalf of the now certified union." 237 F.2d at 599.

See also, *N.L.R.B. v. Masters-Lake Success, Inc.*, *supra*, at page 17. (Denying enforcement of reimbursement order. Doctrine of accretion had been applied in good faith and the Board required new elections to be held).

In a situation where the employees have voiced their approval for the union even though the employer and

the union technically may have committed an unfair labor practice, due reimbursement will not be allowed.⁵ As stated in *Morrison-Knudsen Co. v. N.L.R.B.*, *supra*:

“It by no means inevitably follows, because an employer has so conducted himself towards the

⁵When it is recognized that each case must be decided on its own facts as to whether a dues remedy would act as a penalty, it is clear that all that can be gained from an analysis of the cases dealing with reimbursement of dues is some distillation of what factors and equities should be considered by this Court. However, once some of the equitable considerations are identified, the line of cases decided by this Court commencing with *Morrison-Knudsen Co. v. N.L.R.B.*, *supra*, at page 18, and concluding with *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 352 (C.A. 9, 1970), which is given so much attention by the Board's Brief, identify as a penalty a dues reimbursement order which will act as a windfall to employees and where employees, or any of them, have indicated that they would have wanted to have been union members at the time of the commission of the unfair labor practice. As stated in *Morrison-Knudsen*:

“[R]eimbursement a lot of old-time union men could not be anything but a windfall to the employees and an unjust penalty to the employer.” 276 F.2d at 76.

A summary of the elements to be considered in determining whether a dues reimbursement is a penalty is supplied by *Intalco Aluminum Corporation v. N.L.R.B.* where at least some of the employees opted for union affiliation prior to the unfair labor practices and where the challenged union was a minority union only at the time of recognition:

“There is no specific finding that any of the employees suffered any loss or objected to the payment of dues. No distinction was made between those employees who wanted the union and voluntarily agreed to a dues check-off and those whose dues were checked off only because of the requirement of the collective bargaining agreement.

“On the other hand, the Examiner and Board found an absence of bad faith on the part of the petitioner. It is not a case where the company actively cooperated with the union in carrying out a clearly unlawful contract provision. There is no suggestion of anti-union bias or action. The contract has expired. Throughout the contract the employees did have union representation, even though it was a minority union at the time of recognition.” 417 F.2d at 41.

In *N.L.R.B. v. Jan Power, Inc.*, 421 F.2d 1058, 1064 (C.A. 9, 1970), there was no evidence of any windfall, nor could it be shown that any of the employees at any time wanted to join the

union as to disqualify it from acting as a collective bargaining agent for all his employees, that he has inflicted pecuniary damage upon each member of that union . . .

. . . [s]o far as appears, many of [the employees] may have liked the Association for its own sake, quite independently of anything that the Company did to hoax or compel them to join; they may have preferred it to any alternative then available; either to an affiliated union, or to no union at all." 276 F.2d at 75.

IV.

KINNEY RECEIVED NO BENEFIT FROM THE DUES AND ACTED PURELY AS A CONDUIT IN THE REMIT- TING OF FEES TO LOCAL 399.

Kinney at no time received any financial benefit from the dues collected from the Park LaBrea employees. None of the dues were retained by Kinney in whole or in part and Kinney received no rebates from Local 399. All of the dues of Local 399 members were paid by Kinney to Local 399. Kinney, as a mere conduit in

union, nor was there any subsequent election. The Court stated that while the Board could make a separate investigation as to employee voluntariness in joining the union, it was not required to do so where there was *no* independent evidence on the record of voluntary joining or ratification:

"As to those who did join after the execution of the agreement, it may be argued that the Board could have excluded those employees who voluntarily joined. Though the Board could have done so, it was not required to follow this court in the circumstances of this case."

In *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, 429 F.2d at 1358, where again there was no evidence of a windfall nor employee acceptance of the union, nor a subsequent election, dues reimbursement was ordered because it "returns to the employees what has been taken from them to support an organization not of their choice." Here, of course, the ratification of the employees shows Local 399 was their chosen representative.

the collection of fees, cannot be held responsible for dues reimbursements; to order Kinney to reimburse dues would be a penalty once it has been acknowledged that all the dues have been transmitted to Local 399.

In the most recent case on this subject, *N.L.R.B. v. Mears Coal, supra*, at page 20, (where the union was not made a party and therefore the only possible source of reimbursement was the employer, and where the reimbursement was for dues paid only for union representation without any benefits) the court held as follows:

“Here the general counsel has chosen not to make the SLU a respondent, and the effect of enforcement of the reimbursement order will be to require a second payment by the employer-respondents while the beneficiary of their assistance gets a windfall. Moreover since the Board’s order provides, quite correctly we think, for continuance of the bargained for employee benefits, including royalty payments to the SLU Welfare Fund, the order will not have the effect of severing all ties between the employees and the SLU. The reimbursement order does not apply to the welfare fund. True, the welfare fund is an entity separate from the union. But, realistically, future benefits from the welfare fund will depend upon ongoing royalty payments. The fund provides a more substantial focus for employee interest in the SLU than the dues. In these circumstances it is difficult to see how the policies of the Act will be advanced by permitting a windfall to the SLU, which it can use in the new election campaign, while imposing a penalty on the employer-respondents. We decline to enforce the Board’s reimbursement order against any respondent.” 437 F.2d at 513.

Similarly, in *Hughes & Hatcher, Inc. v. N.L.R.B.*, *supra*, at page 19, the dues reimbursement was raised, as here, and disposed of as follows:

“One other matter remains, and that is the Board’s order requiring H & H to make restitution to its employees of the initiation fees and dues paid by its employees under the checkoff provisions of the bargaining agreement, and the proviso in the order which attempted to preserve the rights of employees against the employer under the illegal agreements.

“Retail Clerks asserts in its brief that these moneys are held in escrow by H & H to await the decision of this court. Amalgamated states in its brief that the moneys were paid to it. The record does not disclose the facts.

“If H & H is holding the moneys in escrow to await the decision of this court, there will be no problem, as it can make distribution in accordance with the Board’s order. *If H & H has paid the moneys to Amalgamated, then the Board’s order should be directed against that union and not against H & H, which acted merely as a conduit for the funds, and there is no reason why it should be penalized.* Amalgamated violated the Act just as well as H & H, and if it received the money it should refund the same.” (emphasis added) 393 F.2d at 567-68.

See also, *N.L.R.B. v. U.S. Truck Co., Inc.*, *supra*, at page 19:

“The Board’s power to command affirmative action is remedial and not punitive, we think that the order compelling the employer to restore dues

not retained by it for its own benefit, but turned over to representatives of the employees, is punitive and not corrective." 124 F.2d at 890.

See other cases cited at pp. 16-21, *supra*.

Conclusion.

By virtue of the foregoing it is respectfully submitted that the Petition for review be granted and the Board's Order for enforcement be denied.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED

No. 71-2602

FEB 2 1972

CLIFFORD N. HERBERT,

Plaintiff-Appellee,

vs.

WM. B. LUCK, CLERK

MOBIL OIL CORPORATION, a Corporation,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HONORABLE JAMES F. BATTIN PRESIDING

APPELLANT'S REPLY BRIEF

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I hereby certify that on the day of,
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ABBREVIATIONS

The following abbreviation when used herein has the indicated meaning:

RT = Reporter's Transcript

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 71-2602

CLIFFORD N. HERBERT,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE JAMES F. BATTIN PRESIDING

APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT

The foundation for the offer of the hospital records of Billings Clinic and its x-rays (Exhibits F and F-1) and the records of Forsythe Hospital (Exhibit L) was waived without qualification by plaintiff's attorney at the time of their original offer by defendant during cross-examination of Dr. Clayton Allard, plaintiff's medical witness. When the two sets of hospital records were re-offered during defendant's case, the foundation therefor was again waived by plaintiff's attorney.

The offer of the hospital records and x-rays during the cross-examination of plaintiff's medical witness was not beyond the scope of direct examination which of necessity included the plaintiff's physical condition before and after the accident and the issue of causation. The scope of cross-examination is not limited to specific questions which have been asked on direct examination, but includes the entire subject matter of direct examination.

The hospital records offered were admissible on the question of causation of plaintiff's claimed injuries and plaintiff confuses causation with relevance. The relevance and probative value of the records reflecting prior injuries claimed is for the jury to determine.

ARGUMENT

I

Foundation for Hospital Records and X-Rays Was Waived Without Qualification by Plaintiff During Trial.

The plaintiff's Brief indicates that he agrees that the District Court did not give the proper reasons for its refusal of the hospital records which were offered as a part of the cross-examination of his medical witnesses. This is shown by his comments and citations to the effect that where testimony is excluded, if properly done, even for the wrong reason, that the exclusion of evidence will not then be disturbed. Then, in an effort to justify the District Court's exclusion of these Exhibits and curtailment of cross-examination, the plaintiff advances other reasons than those given by the District Court which he hopes may support its rulings.

At the outset of this reply, let us dispose of plaintiff's argument that no foundation was laid for admission of the hospital records (Exhibits F, F-1 and L). Foundation for the hospital records and x-rays was waived by plaintiff's attorney not once, but each of the times that the two sets of hospital records were offered by defendant. Plaintiff's attorney stated in the record during the trial that he was not arguing about foundation of those records. Now, plaintiff, on appeal raises that question for the first time.

The defendant was prepared with a record custodian to establish the necessary foundation for the offer of the records of the Billings Clinic and its x-rays (Exhibits F and F-1), during the cross-examination of Dr. Clayton Allard (RT 339, RT 346). To save time for all concerned and to eliminate formal testimony identifying hospital records, the plaintiff's attorney was asked if he would agree that foundation could be waived for those exhibits. He then replied, "As far as foundation, I am not arguing about foundation" (RT 346). As a part of the same colloquy, he stated, "Yes, they do not have to call the librarians" (RT 347).

It is therefore clear from the record that any foundation for Exhibits F and F-1, records of Billings Clinic and x-rays, was waived when they were first offered. But, if there is any question about a complete and unqualified waiver of the foundation of those records, the same waiver was reasserted when those exhibits were re-offered during the defendant's case. At that time, referring to Exhibits F and F-1, the District Court stated, "They have been

identified. The foundation has been laid". (RT 444). It is submitted that the Court meant that the foundation had been waived. Very likely the Court actually stated that the foundation had been "waived" and the reporter may have misunderstood by reason of the similarity of the words. The result, however, is the same in either event.

As a practical matter, to save time, it is seldom necessary in any jurisdiction to make formal identification of hospital records. Trial counsel, generally, at either a pre-trial conference, or during trial by agreement in the record, waive identification and foundation for the admission of such records.

The waiver of foundation for the admission of hospital records was made in a pre-trial stipulation in *Gausсен v. United Fruit Company*, 412 F.2d 72 (2d Cir., 1969) cited by defendant in its Opening Brief. That pre-trial stipulation in *Gausсен* was for all practical purposes the same as the several agreements by plaintiff's attorney to waive such identification and foundation in this case.

The plaintiff now seeks to qualify the waiver he gave. He argues that the District Court understood his waiver to extend only to identification as being from a particular hospital, and not to a waiver of all foundation requirements. This is untenable and unbelievable. *There was no qualification or limitation put upon the general waiver of foundation of the records of the Billings Clinic and its x-rays when that waiver was given by plaintiff's attorney on either of the two occasions when he agreed to waive them* (Emphasis supplied).

Foundation for the admission of the records of the Forsythe Hospital (Exhibit L) was also waived by plaintiff's attorney during the cross-examination of Dr. Clayton Allard (RT 356). Later, during the defendant's case when those records (Exhibit L) were re-offered by the defendant, this question was again discussed, and the record shows the following:

(Defendant's Attorney) "Just to be sure, for the record, foundation on this was waived?"

(The Court) "Yes, that was my understanding."

(Plaintiff's Attorney) "Yes." (RT 446).

Since the defendant had both of the record room custodians available to identify and lay the necessary foundation for the hospital records in question, it obviously would have used those witnesses to prove such purely technical and formal matters, absent the waiver by plaintiff of that requirement. They were released from testifying on the unqualified assurance that their identification of the records had been waived by plaintiff.

Plaintiff also urges in his Brief that these hospital records could not be admissible because he did not have the opportunity to cross-examine the doctors who made the records. That same argument was advanced and rejected by this Court in *Medina v. Erickson*, 226 F.2d 475 (9th Cir., 1955), which plaintiff acknowledges as a correct statement of the law. There, this Court stated l.c. 482,

"Having met the test of Section 1732, the reports were admissible even though they contained hearsay and denied to the administratrix cross-examination of the entrants."

Considering that plaintiff cites and acknowledges the *Medina* case, it is difficult to see how he can seriously urge a point which was previously considered by this Court and disposed of adversely to his contention. It should be borne in mind that the purpose of the Federal Business Record Act's exception to the hearsay rule is to facilitate the admission into evidence of hospital records, without requiring persons who made the entries to take the stand. *Harris v. Smith*, 372 F.2d 806 (8th Cir., 1967). After the records are admitted, their connection is to be made by the jury as shown by the cases cited by appellant heretofore.

As discussed in more detail in defendant's Opening Brief, the hospital records and x-rays (Exhibits F, F-1 and L) were clearly admissible not only on the question of causation of the claimed damages, but also on the question of credibility. Defendant set forth in its Opening Brief certain excerpts from the record where plaintiff had denied prior injuries to the same areas of his body as he claims in his lawsuit. The plaintiff's Brief does not take issue with the credibility question.

No argument is made by the plaintiff, nor are any authorities cited by him which oppose the offer of those records as going to the credibility of the plaintiff and the various citations of the defendant supporting admissibility on that ground. Credibility of witnesses is always relevant, *Sanders v. Buchanan*, 407 F.2d 161 (10th Cir., 1969).

II

The Scope of Cross-Examination Includes the Subject Matter of Direct Examination, and Is Not Limited to the Specific Questions Asked on Direct Examination.

Plaintiff argues that the offer of the hospital records during cross-examination of his medical witnesses was beyond the scope of the direct examination. This seems to be based upon assumption that no specific mention of those records was made on direct examination of these witnesses. No objection on the ground of being beyond the scope of direct examination was made during trial, nor did the District Court assign that as a reason for its rulings. Aside from that, cross-examination is not confined to specific questions asked on direct examination. It extends to the subject matter about which inquiry was made. *Union Automobile Indem. Assn. v. Capitol Indem. Ins. Co.*, 310 F.2d 318, 321 (7th Cir., 1962).

Part of the subject matter of the direct examination of the medical witnesses here was the physical condition of plaintiff before and after the accident in question. By the nature of the case it had to be. Further, the causation of plaintiff's claimed physical condition was a part of the subject matter of the direct examination. Such questions had to be asked in direct examination of the doctors, for the plaintiff to have made a submissible case in the first instance. The law does not require that prior hospital records involving the plaintiff must themselves be specifically mentioned in direct examination before the defendant has the right to cross-examine a witness about them. Leeway is to be given on cross-examination to

probe witnesses using pertinent facts, even though not in evidence, to test his credibility or the reasonableness of his opinion. *Wagner v. Penn. R. Co.*, 282 F.2d 392 (3rd Cir., 1960). The scope of cross-examination, contrary to the argument of plaintiff is not limited to the precise, narrow scope of questions asked on direct examination, but extends to the scope of the subject matters touched on in direct examination. *Haase v. Chicago, M., St. P. & P. R. Co.*, 76 F.Supp. 393 (D.C., Minn., 1948). It is urged by plaintiff that the normal procedure would have been for defendant to have recalled Dr. Allard in defendant's case, after identifying the hospital records. Such is not required procedure and plaintiff cites no authorities so holding. Defendant is not compelled to postpone until its case in chief admissible evidence which would test the expert opinion of a witness on cross-examination. It would no longer be cross-examination to do it as plaintiff contends and would, of course, be thereby prejudicial to defendant. Beyond that, the District Court had already refused the offer of the two sets of hospital records, and had stated, (1) they were cumulative, and (2) that they could not be used without producing the doctors who wrote them. If the Court thought they were cumulative when offered during plaintiff's case, it would have still refused them in defendant's case—in fact, it did then refuse the Forsythe Hospital records. If the Court thought they could not be used without producing the doctors who made them, which has been shown not to be the law, the Court would have again so ruled in defendant's case if it produced Dr. Allard. Why go through a useless procedure?

If cross-examination means anything, it means the right to test evidence as it comes in—not be required to put that interrogation on as direct evidence by recalling opposition witnesses in your case in chief, after the minds of the jurors are made up.

III

Relevance Should Not Be Confused with Causation, and the Relevance and Probative Value of Prior Injury Is for the Jury to Determine.

The plaintiff continues to urge the question of relevance, but he confuses relevance with causation. That distinction was clearly pointed out in the case of *Frank Mahon v. The Reading Company*, 367 F.2d 25 (3rd Cir., 1966) which was cited by defendant in its Opening Brief. The plaintiff here argues that the records must be excluded unless they can be connected up to the present injury by competent testimony. There was an expert witness on the stand for plaintiff at the time these records were first being offered, and defendant told the District Court he proposed to use them in cross-examination of that witness. The witness had already answered a hypothetical question on causation from the plaintiff giving the accident in issue as the cause of the injuries. He had both from his own interrogation of plaintiff and in the facts he was asked to assume, been given no information about prior injuries to the same areas as claimed including none of the information in those records. Additionally, he even admitted that evidence of prior injuries to areas claimed would change his opinion on the cause of those injuries. That witness would have connected up the

former conditions if the Court had not refused the offers and restricted the cross-examination. Further, as set forth in the quoted language in our Opening Brief, the *Mahon* opinion not only distinguished relevance from causation, but clearly stated that whether there was any connection between the two instances was for the jury. That Court recognized that if the evidence of prior injuries being offered was too trivial to be of any value, the jury would ignore it.

In his efforts to argue that the hospital records were not relevant, the plaintiff has commented several times that the plaintiff's prior episodes of injury occurred six years and more before the accident in question. The period of time since the prior injury might be a factor which the expert witnesses and/or the jury could consider, but that does not of itself indicate any lack of relevance. As a matter of fact, in the case of *Frank Mahon v. The Reading Company, supra*, the reversal by the Court of Appeals was because of failure to permit cross-examination about a prior condition arising from an accident eight years before the accident in question and 12 years before the trial of the case.

The case of *O'Shea v. Jewel Tea Co.*, 233 F.2d 530 (7th Cir., 1956), cited in the Opening Brief of defendant, likewise stressed that the basic problem was one of causation, as well as credibility. That case, involving admissibility of a doctor's records, and the refusal by the trial court to admit them being construed as prejudicial error is certainly analogous to this case.

In *Abrams v. Gordon*, 276 F.2d 500 (D.C. Cir., 1960) cited by defendant in its Opening Brief, the Court of Appeals for the District of Columbia held that restricting cross-examination of a medical witness was prejudicial error. In *Young v. Terminal R.R. Assn. of St. Louis*, 70 F.Supp. 106 (D.C. E.D., Mo., 1947) previously cited by defendant, the Court based its ruling on the question of causation and said with regard to admitting records of prior physical condition, “. . . we think the defendant is entitled to have the jury consider them in passing upon the cause of plaintiff's injury”.

The plaintiff has not challenged the applicability of any of the cases or authorities cited by the defendant, nor attempted to distinguish any of them. It therefore seems that plaintiff agrees that the propositions stated in those cases are controlling and are the law applicable to this appeal.

Plaintiff cited several state court cases on the question of relevance but none have any application herein. For example, *Pellegrini v. Chicago Great Western Railway Company*, 319 F.2d 447 (7th Cir., 1963), where a plaintiff was shot in the back 14 years before could obviously not relate to that case where plaintiff claimed brain damage; nor could *Marbut v. Costello*, 34 Ill. 2d 125, 214 N.E.2d 768 (1965) where an attempt was being made to show a prior neck injury in defense of a case where no neck injury, but only lower back was claimed. *Kantor v. Ash*, 215 Md. 285, 137 A.2d 661 (1958) cited by plaintiff involved a claimed heart difficulty from an auto accident and an attempt to show some prior minor injuries (none involving the heart)

was obviously not relevant. The same is true of the other state court cases cited by plaintiff.

This case is not one where injuries or conditions previously affecting entirely different parts of the body are attempted to be shown. We are concerned with previous injuries on two separate occasions that involved the same parts of the body for which plaintiff seeks damages here.

In another effort to urge the lack of relevance of the hospital records, plaintiff constantly refers in his brief to his injury as a "dorsal" injury (upper back). He ignores the facts that in this case he was mainly claiming (and his doctors testified to), injury to his neck (cervical) and low back (lumbar). The constant references in plaintiff's Brief to his injury as a "dorsal" injury appears to be an effort on his part to divert the Court's attention from the claimed neck and low back injuries because those are the areas of complaint and injury shown by the prior hospital records which are in issue.

Plaintiff attempts to take part, but not all, of Dr. Clayton Allard's findings and to say that they do not reflect that the condition shown by the prior hospital records were still present at the time of the accident in issue. In doing so, he overlooks:

(1) Positive testimony by Dr. Allard that plaintiff had straightening of the lumbar spine when Dr. Allard attended him. For example, that doctor said "The main objective findings were in the x-rays, the straightening of the lumbar, cervical lordosis" (RT 348). At another point, Dr. Allard said:

Q. "You are talking about the records again. Did you find, and I ask you this question, any objective findings or symptoms in this case?"

A. "I recall his having had muscle spasm, but I do not have any record of it. Then also on the x-rays of his spine, there is the loss of . . . partial loss of the cervical and lumbar lordosis." (RT 365).

(2) On the issue of whether the loss of normal curvature of the low back was present immediately after the accident, plaintiff's Brief totally ignores that that was a finding of Dr. Tom Malee (RT 298). He was the very first doctor to see the plaintiff, about a week before Dr. Allard saw him, and his deposition with that finding was offered in evidence by the plaintiff and read to the jury.

(3) Low back strain found by Dr. Tom Malee and also by Dr. Clayton Allard—these conditions were shown by the Billings Clinic records before the accident in question.

(4) Muscle spasm in the low back found by Dr. Tom Malee and by Dr. Clayton Allard—also, this condition was shown by the Billings Clinic records.

Since the records of the Billings Clinic showed a low back strain in 1962 and muscle spasm in plaintiff's low back as well as a straightening or loss of the curvature in the low back, those prior conditions as shown by those records are unquestionably relevant. Likewise, the Forsythe records showed prior neck and back complaints. The defendant was entitled to have the jury consider them in determining the cause of plaintiff's injury. Dr. Allard

found all of the aforementioned conditions and attributed them to the accident in issue in this case without having any knowledge or information concerning prior conditions of health of the plaintiff. In fact, his information was that the condition shown by those hospital records did not exist before the accident.

Plaintiff argues that a medical witness called by the defendant, Dr. Danner, had seen the plaintiff on numerous occasions and did not attribute the earlier conditions of plaintiff's back as a part of his present complaints. The record clearly reflects that the plaintiff did not see Dr. Danner with any complaints concerning his neck or back following the 1968 accident. He did see Dr. Danner for other conditions, but in the same way as he failed to reveal his prior conditions of health to Dr. Allard and Dr. Canty, he likewise did not reveal his complaints on the 1968 accident to Dr. Danner. How then could Dr. Danner relate the prior conditions with those plaintiff claimed from the 1968 accident when plaintiff had not discussed them with him or requested treatment for the injuries claimed in this suit.

Even if Dr. Danner did not attribute the earlier conditions of plaintiff's neck and back to the present claimed injuries, that does not mean that Dr. Clayton Allard or Dr. Charles Canty would not have. The record shows Dr. Danner is a general practitioner in contrast to the orthopedic specialties of Dr. Clayton Allard and Dr. Charles Canty. By reason of training alone in their field of specialty, their opinion about the relationship of prior conditions could vary from that of a less specialized practitioner. The vital question is not what Dr. Danner at-

tributed the former conditions to, but rather the restriction placed on the cross-examination of Dr. Allard and Dr. Canty. As indicated before in its Opening Brief, those were the witnesses who made the submissible case for the plaintiff on causation. Dr. Canty gave as the specific reason for his opinion that the plaintiff told him he had had no prior neck or back injuries. Had the defendant been allowed to show the prior neck and back conditions by its offer of the two hospital records, Dr. Canty might have chosen to question the credibility of the plaintiff, the jury might also have questioned his credibility, and Dr. Canty would obviously have given an entirely different reason as to the cause of the claimed injuries.

There is still another accident and injury to plaintiff's neck and back which plaintiff failed to recall in direct examination or on cross-examination. This occurred in 1963 when he fell off of a truck and was in the hospital in North Dakota (RT 414, 415). This evidence came out for the first time during Dr. Danner's testimony, and while not directly an issue on this appeal, nevertheless, reflects plaintiff's credibility and his prior condition of health which plaintiff contends was perfect.

In his argument that the Forsythe Hospital records are not relevant, plaintiff says that his principal complaints then were about his legs (p. 28, Plaintiff's Brief). Apparently the plaintiff overlooks that when he was asked in cross-examination to relate his complaints of injury from the 1968 accident, he specifically included shooting pains in both legs (RT 138-140). Further, for some reason the plaintiff seems to argue that what he testified to

as being his difficulties at the time of the former hospitalization should be the controlling factor on the relevance of the hospital records, rather than the records themselves. This is particularly inappropriate as an argument where the plaintiff's credibility is so seriously in issue. Those records were offered as going to the physical condition of plaintiff and as going to his credibility (RT 357, 358). His neck, low back and both legs were then his complaints, and they were at time of trial.

CONCLUSION

For all the reasons stated above and stated in defendant's original Brief, the defendant requests the United States Court of Appeals for the Ninth Circuit to reverse the verdict and judgment in favor of plaintiff in the District Court and remand this cause back to that Court for a new trial.

Respectfully submitted,

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 71-2602

CLIFFORD N. HERBERT,
Plaintiff-Appellee,

vs.

MOBIL OIL CORPORATION, a Corporation,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HONORABLE JAMES F. BATTIN PRESIDING

APPELLANT'S OPENING BRIEF

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I hereby certify that on the ^{16th} day of December, 1971, I mailed by United States mail, postage prepaid, two copies of Appellant's Opening Brief to Roland V. Colgrove, Esq., P. O. Box 550, Miles City, Montana 59301, and to Hughes and Bennett and Alan F. Cain, Attorneys at Law, Suite A, 406 Fuller, Helena, Montana 59601.


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Abbreviations

The following abbreviations when used herein have the indicated meanings:

CR = Clerk's Record

RT = Reporter's Transcript

IN THE
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FOR THE NINTH CIRCUIT

No. 71-2602

CLIFFORD N. HERBERT,
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Defendant-Appellant.

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FOR THE DISTRICT OF MONTANA
HONORABLE JAMES F. BATTIN PRESIDING

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

I. Did the District Court err:

A. When it precluded defendant from conducting a full cross-examination of the plaintiff's medical experts by refusing to admit into evidence the records and X-rays of the Billings Clinic and the records of the Forsythe Hospital which went to the question of causation of the plaintiff's injuries where those records demonstrated that plaintiff had incurred prior injury to the same areas of his body

(neck and back) for which he is in the instant case claiming injury and damage?

B. When it precluded defendant from conducting a full cross-examination of the plaintiff's medical experts by refusing to admit into evidence the records and X-rays of the Billings Clinic and the records of the Forsythe Hospital which went to the credibility of the plaintiff who testified that he had been in excellent health prior to the accident in question and who denied that he had any prior injury to his neck and back where those records demonstrated that plaintiff had incurred prior injury to the same areas of his body (neck and back) for which he is in the instant case claiming injury and damage?

II. Whether the District Court erred in refusing to admit into evidence the hospital records of Forsythe Hospital when re-offered by the defendant during its case which clearly show that the plaintiff previously suffered injuries to the same areas of the body upon which the instant claim is predicated?

III. If the error of the District Court in refusing to receive into evidence the above records (Billings Clinic and Forsythe Hospital) be individually deemed harmless, did such error when considered cumulatively, constitute prejudicial error?

STATEMENT OF THE CASE

This appeal is brought from a judgment entered on June 10, 1971, and the Order overruling defendant's Motion for New Trial on June 25, 1971, by the Honorable James F. Battin of the United States District Court for the

District of Montana, Billings Division. Clifford N. Herbert, plaintiff herein, originally filed suit against Mobil Oil Corporation, defendant herein, in the District Court for the Seventh Judicial District of the State of Montana in and for the County of Dawson. The action was removed by defendant, Mobil Oil Corporation, to the United States District Court for the District of Montana, Billings Division on the ground of diversity of citizenship and an amount in controversy exceeding Ten Thousand Dollars (\$10,000). Trial occurred in Billings, Montana, in June, 1971, and resulted in a verdict for the plaintiff against the defendant in the sum of \$75,245.15 and costs, and judgment was entered thereon. Thereafter, defendant filed its timely Motion for a New Trial and argument was heard on the Motion on June 23, 1971. On June 25, 1971, the trial court overruled defendant's Motion for a New Trial. On July 20, 1971, defendant filed its Notice of Appeal from the judgment entered on June 10, 1971, and from the Order of June 25, 1971, overruling the defendant's Motion for New Trial; and it asks this Court to reverse and remand the cause for a new trial.

STATEMENT OF FACTS

Clifford N. Herbert, plaintiff, was employed by Houck Transport Company (RT, p. 102) as a truck driver hauling petroleum products (RT, p. 103). On March 2, 1968 he drove his truck from Glendive, Montana to Beach, North Dakota, and made a delivery to the bulk plant of Mobil Oil Corporation, defendant (RT, p. 103). He stopped first at the Mobil Filling Station, picked up the key, and drove to the bulk plant (RT, p. 104). After completing the

unloading process, he was descending the wooden stairs from the dock when the top step broke, causing him to fall on the ground between the loading platform and his truck parked adjacent thereto (RT, p. 108). The dock is approximately three feet, ten inches from the ground (RT, p. 443).

Plaintiff got in his truck and drove back to the nearby Mobil Service Station where he had secured the key (RT, p. 110). He returned the key and while he was there, he told the attendant that he had fallen and that he had been injured. He drove his truck back to Glendive, Montana and as he did so, he says that he had pain in his neck and back and that he hurt pretty much all over (RT, p. 110). That same day he contacted Dr. Tom Malee, a general practitioner in Glendive. He was examined and placed in a local hospital where he remained for about ten days (RT, p. 110). X-rays taken at that time for Dr. Tom Malee revealed some straightening of the lumbar (low back) curvature (RT, p. 298). No X-rays were taken of the neck (RT, p. 296). Plaintiff was treated at that time with bedrest and medications and Dr. Tom Malee found pain, tenderness, and muscle spasm in his back, but the reflexes were normal and there was no nerve damage (RT, p. 297). No traction treatment was used (RT, p. 179). The Glendive Hospital records themselves reflect no objective findings of injury (RT, p. 325). Dr. Tom Malee's diagnosis was inflammation of the muscles of the neck and back due to injury (RT, p. 301). Dr. Tom Malee did not see plaintiff thereafter (RT, pp. 300-301). This doctor's deposition was taken and was offered by plaintiff in the trial (RT, pp. 294-305). Dr. Tom Malee

did not specifically connect the accident in question as the cause of the conditions for which he treated plaintiff except to say they were caused by trauma (RT, p. 301).

On the day he was released from Glendive, Montana Hospital, plaintiff went to the Deaconess Hospital in Billings, Montana and he remained there 18 days under the care of Dr. Clayton Allard, orthopedist (RT, pp. 111, 309). The records of the Deaconess Hospital show no muscle spasm or limitation of motion of the neck or back and showed no objective findings of injury (RT, pp. 331-333). Plaintiff was improved on release from the Deaconess Hospital (RT, p. 331). Dr. Clayton Allard diagnosed his condition as a chronic cervical and dorsal sprain (RT, p. 316) and a chronic low back strain (RT, p. 318), and testified that these were permanent conditions (RT, p. 321). He recommended that plaintiff give up truck driving and try a sedentary type of work (RT, p. 319). Dr. Clayton Allard did find a straightening of the lumbar (low back) and cervical (neck) curvature or lordosis, but had no other objective findings (RT, p. 348). Plaintiff unqualifiedly denied to this doctor any previous difficulties involving his neck or back except for a brief low back difficulty in 1958 (RT, p. 334). As far as the neck was concerned, Dr. Clayton Allard could not find anything to substantiate the complaint plaintiff was making (RT, p. 330). The hypothetical question to Dr. Clayton Allard on causation asked the doctor to assume good health of plaintiff before the accident except for an ulcer (RT, p. 320).

Plaintiff went to a chiropractor in Glendive, Montana (RT, p. 142) approximately ten times during July and Au-

gust, 1968 for diathermy (RT, p. 143). The chiropractor was not called as a witness by either side in the trial.

The only other hospitalization for plaintiff since the fall at the bulk plant was in 1969 at Sydney, Montana Hospital for stomach difficulties which was not claimed to be in any way related to the accident in question (RT, pp. 166-167). Plaintiff has worn no back supports, neck collars, bandages or braces (RT, p. 183) and sustained no cuts or bruises (RT, pp. 178-179). He claimed prior good health except for an ulcer (RT, p. 115). He denied prior injury to the areas of the body that he was claiming were injured in the accident in question, principally the neck, back, and intermittent headaches (RT, p. 116). Plaintiff enrolled in Junior College at Glendive, Montana after the accident, attended classes part-time for two years and was still attending school at the time of the trial of this case (RT, p. 170). He did work approximately two weeks at a gasoline service station, sometime between the date of the accident, March 2, 1968, and the trial, but otherwise contended he had not worked (RT, p. 126).

Plaintiff claims that his activities since the accident in question have been limited, but he does admit that he had laid some pipe in his garden as shown by surveillance movies secured by defendant (RT, pp. 169-170). Plaintiff also admits that he has gone on a couple of hunting trips (RT, pp. 172, 173) and that he was on one four-day camping trip (RT, p. 171). He began driving his personal automobile approximately two or three months after the accident in question and has driven it around the area where he lives ever since, including to and from school (RT, pp. 170, 175).

In the cross-examination of Dr. Clayton Allard, defendant offered the 1962 records of the Billings Clinic (Exhibit F) and X-rays from the Billings Clinic taken at the same time (Exhibit F-1, RT, p. 358). Those records showed loss of curvature of the lumbar spine, low back strain, questionable disc at L4-L5 level and evidence of muscle spasm with straightening of the lumbar spine (RT, p. 341). Defendant offered in cross-examination to present these additional facts from the 1962 Billings Clinic records to Dr. Clayton Allard as:

- (1) reflecting the prior condition of health of plaintiff (RT, p. 345),
- (2) impeaching and attacking the credibility of plaintiff (RT, p. 345),
- (3) to determine if it would qualify his expressed opinion on causation (RT, p. 343), and,
- (4) to have Dr. Clayton Allard interpret the 1962 X-rays from the Billings Clinic which showed the same condition as he now found (RT, p. 346).

The Court refused these offers (RT, pp. 344, 345).

The reasons the District Court gave for refusal of the Billings Clinic records during the cross-examination of Dr. Clayton Allard were that they were:

- (1) in a sense cumulative since Dr. Clayton Allard had already testified that plaintiff had advised him in giving a medical history that he had had a low back pain at a prior time, and,
- (2) for the reason that plaintiff himself on cross-examination had admitted that he had an accident while working for Safeway Stores, and the Court

stated that it did not believe it would be proper at that time to further impeach the plaintiff (RT, pp. 344, 345).

The Court indicated that if the doctor who made the Billings Clinic records and who took the X-rays were produced, that the defendant could then offer these records and that the Court might admit them (RT, pp. 344, 345). Foundation and identification for the records of the Billings Clinic and their X-rays (Exhibits F and F-1) were waived (RT, p. 347). In refusing the Billings Clinic records, the Court overlooked that they were for the year 1962—not the time when Dr. Clayton Allard said plaintiff mentioned a previous low back condition, which was 1958 (RT, p. 334). Also, the Court overlooked in referring to a Safeway Store injury that plaintiff denied that that accident involved his back (RT, p. 168).

Dr. Clayton Allard admitted that if he were shown an X-ray which showed the loss of normal curvature before the accident that that would change his opinion about whether or not that is connected with this accident (RT, p. 371).

Also during the cross-examination of Dr. Clayton Allard, the 1958 records of the Rosebud Hospital, Forsythe, Montana (Exhibit L), were offered by defendant (RT, pp. 354, 355, 357). Foundation and identification of Exhibit L was waived (RT, p. 356). They were offered as going to the credibility of plaintiff, as reflecting the prior physical condition of plaintiff and were proposed by defendant to be used in the cross-examination of Dr. Clayton Allard (RT, pp. 354-357). This offer was refused by the Court (RT, p. 356).

Dr. Charles R. Canty examined plaintiff on April 15, 1971 on behalf of defendant (RT, p. 379). He was called as a medical witness by plaintiff (RT, p. 378). In his physical examination he found plaintiff had some rigidity in his back, some muscle spasm and a list (RT, p. 380). He found some limitation of motion of plaintiff's back (RT, p. 381), no evidence of fractures, loss of normal curvature in the low back and calcification or spurring (RT, pp. 387, 388). In response to a hypothetical question which assumed prior good health (RT, p. 396), Dr. Charles R. Canty testified that the accident in question injured plaintiff's back (RT, p. 398). His reason for that opinion was that he "questioned this man about previous back injuries, and he stated that he did not have any" (RT, p. 398). Dr. Charles R. Canty testified that plaintiff's condition was permanent and recommended he seek other employment (RT, p. 399). As far as the arthritic changes in plaintiff's spine, Dr. Charles R. Canty estimated most of those took place within the five years preceding his examination (RT, p. 401). Those arthritic spurs, pre-dating the accident, could more than likely cause some limitation of motion (RT, p. 402), and some muscle spasm before the accident (RT, p. 403). At least half of the 30 per cent residual disability which Dr. Charles R. Canty found would in his opinion pre-date the accident of March, 1968 (RT, pp. 403, 404). He found no neurological involvement (RT, p. 405).

The records of the Billings Clinic of 1962 (Exhibit F) were re-offered during defendant's case in chief (RT, p. 444). No objection was then made to said offer and the records of the Billings Clinic were then received in evidence (RT, p. 444). The X-rays (Exhibit F-1) previously

offered and refused were not then re-offered (RT, p. 444). Defendant re-offered the records of Forsythe Hospital (Exhibit L) during its case as going to the credibility of plaintiff for impeachment purposes (RT, pp. 445, 446). The part of that hospital record which impeached plaintiff's denial of prior neck and back difficulties, and his denial of medical attention for those conditions, was specifically read into the record in the trial at the time of the offer (RT, p. 445). It included a complaint by plaintiff on entering that hospital on July 28, 1958 of "pain in cervical and lumbar areas of back and lower right abdominal quadrant. Says he has steady dull headache" (RT, p. 445).

The Court again refused the offer of the Forsythe Hospital records (Exhibit L) stating that it was not proper without benefit of the doctor or nurse to testify (RT, p. 446). Foundation and identification for the Forsythe Hospital records were again waived (RT, p. 446).

After the cause was submitted to the jury, a verdict was returned in favor of plaintiff on June 10, 1971 (RT, p. 527) (CR, p. 391). Defendant filed its timely motion for a new trial including that the Court erred in refusing to allow into evidence Exhibit L, medical records of plaintiff from Rosebud Hospital, Forsythe, Montana, reflecting plaintiff's prior physical condition and that the Court erred in refusing the offer of the records of Billings Clinic (Exhibit F) and refusing to permit cross-examination of plaintiff's medical witnesses on the question of causation (CR, pp. 396, 397). The Court overruled defendant's motion for a new trial (CR, p. 421) and thereafter, defendant duly filed its notice of appeal to this Court (CR, p. 426).

SUMMARY OF ARGUMENT

The basic questions in this appeal involve prejudicial error committed by the District Court in denying the offer by defendant of the records of Billings Clinic (Exhibit F), and its x-rays (Exhibit F-1) and the records of Forsythe Hospital (Exhibit L). All of these records which predate the instant accident from which plaintiff claims injuries and damages, contain findings and/or complaints by the plaintiff which illustrate that plaintiff had pre-existing injuries to the same areas of the body for which he now claims damage for personal injury and permanent partial disability. Both sets of hospital records and the x-rays of Billings Clinic were admissible under the Federal Business Records Act, and foundation and identification had been waived. Both sets of hospital records and the x-rays of Billings Clinic were offered by the defendant during the plaintiff's case as a part of the cross-examination of one of plaintiff's expert witnesses, Dr. Clayton Allard. The refusal of the offer of both sets of hospital records and the x-rays of Billings Clinic at that time denied the defendant its right to use both of those hospital records and x-rays in a full and complete cross-examination of Dr. Clayton Allard. Those records and x-rays were material on the question of causation of the claimed injuries and damages, and also were material on the question of credibility of the plaintiff because entries therein were at war with and in conflict with his testimony on direct examination of prior excellent health, and his denial on cross-examination of any prior neck or back injuries. Further, they attack his credibility in that he had not disclosed to Dr. Clayton Allard the prior conditions shown by those records. Dr.

Clayton Allard admitted that if shown that the prior condition existed, it would change his opinion on causation of the claimed injuries.

The error of the District Court in refusing the admission of the two separate sets of hospital records (Exhibits F and L) and x-rays of Billings Clinic (Exhibit F-1) which were admissible under the Federal Business Records Act during the cross-examination of Dr. Clayton Allard also foreclosed the right of the defendant to have a full cross-examination of Dr. Charles Canty, plaintiff's only other medical expert on the question of causation. The denial of those hospital records and x-rays during the cross-examination of Dr. Clayton Allard of necessity extended to and included the same denial during the cross-examination of Dr. Charles Canty. They were likewise material on the question of causation and their refusal denied a full cross-examination of that expert because he testified that the reason for his opinion that the accident caused the injuries claimed, was that the plaintiff had denied any prior injuries.

The District Court also erred when it again refused the re-offer of the Forsythe Hospital records during the defendant's case in chief. Again, foundation and identification of those records was waived and they were admissible under the Federal Business Records Act. The Court did, upon a re-offer of the records of the Billings Clinic during defendant's case, then admit those records into evidence. The x-rays previously offered during plaintiff's case were not then re-offered. However, the admission of those records at that time did not cure the error committed during

plaintiff's case, because the refusal of the offer of the records of the Billings Clinic at that time denied the defendant a full and complete cross-examination of the only medical witnesses who made a submissible case for the plaintiff.

Each and all of the errors of the District Court in the rulings referred to above were in and of themselves prejudicial to the defendant. However, if for any reason they did not of themselves constitute prejudicial error, then when considered in their totality, they clearly did.

ARGUMENT

I

The District Court Erred in Refusing the Admission and the Use in Cross-Examination of Prior Hospital Records of Probative Value of Expert Witnesses, on the Question of Causation of Claimed Damages and on Credibility of Plaintiff.

A

Refusal of Billings Clinic Records and X-Rays for Cross-Examination of Expert Witnesses.

The most vital issue in the trial of this case was whether plaintiff sustained personal injuries as a result of the accident in question, and if so, to what extent. Obviously, a party must be given a full opportunity to cross-examine expert witnesses especially on questions of causation. But here, in spite of prior hospital records of probative value which clearly revealed former difficulties to plaintiff's neck and back—the same conditions for which he was bringing this suit—the District Court refused the offer of these records, and precluded a complete cross-examination of plaintiff's two medical expert witnesses.

Three medical witnesses testified in plaintiff's case. The first, Dr. Tom Malee, was by deposition. He had not seen plaintiff except for the first ten days after the accident, and he did not really give any opinion on causation. However, Dr. Clayton Allard and Dr. Charles Canty were called by the plaintiff and both gave opinions on the question of causation. The refusal by the Court of the offer by defendant of the records of the Billings Clinic (Exhibit F) and its x-rays (Exhibit F-1) during the cross-examination of Dr. Clayton Allard denied a full cross-examination of that witness. That ruling by the Court also placed the same limitation on defendant's cross-examination of Dr. Charles Canty who followed Dr. Clayton Allard as an expert witness. As a result of the Court's refusal, *defendant was denied its right to fully cross-examine each of the only two medical witnesses who made a submissible case for plaintiff on the question of causation of his claimed injuries* (Emphasis supplied).

There are unusually compelling reasons in this case why the prior physical condition of plaintiff should particularly be the subject of broad and searching cross-examination.

First, on direct examination, he testified that he had excellent health except for an ulcer prior to the occasion in question (RT, p. 115).

Second, on cross-examination, he denied prior neck and/or back difficulties (RT, pp. 144, 146).

Third, when his principal medical expert witness, Dr. Clayton Allard, was asked a hypothetical question to establish causation, he was asked to assume that "prior to that time, he testifies he was in good health except for this flare-up of ulcer." (RT, p. 320).

Fourth, Dr. Clayton Allard was told by plaintiff of a brief period of low back difficulty in 1958, but plaintiff did not reveal to that doctor the difficulties shown in the 1962 records of Billings Clinic (RT, p. 334).

Fifth, Dr. Clayton Allard admitted that if he were shown the same or similar prior conditions in plaintiff, it would change his opinion (RT, p. 371).

Sixth, Dr. Charles Canty based his opinion on the fact he had asked plaintiff about previous injuries, and that plaintiff had stated he had none (RT, p. 398).

With the above background as the testimony, defendant attempted to fully cross-examine Dr. Clayton Allard and as a part thereof to test his opinion on causation. In doing so, defendant offered records of the Billings Clinic (Exhibit F) and its x-rays (Exhibit F-1) for the year 1962, any foundation and identification of those records having been waived. In making that offer, defendant advised the District Court that it proposed to cross-examine Dr. Clayton Allard with those records and their contents. Clearly, his direct examination had shown he had no knowledge of any low back difficulty of plaintiff in 1962. Further, these records being offered were four years later than the "period of low back pain in 1958" that Dr. Clayton Allard has testified that plaintiff had mentioned to him.

The District Court ruled that the Billings Clinic records and x-rays (Exhibits F and F-1) would not be received in evidence, and that defendant could not use them to cross-examine Dr. Clayton Allard. The stated reasons given by the Court for this were:

- “(1) That it would be in a sense cumulative, since Dr. Clayton Allard has already testified that the plaintiff advised him, in taking a medical history, that he had a low back pain at a prior time; and,
- (2) That the plaintiff himself on cross-examination of counsel for the defense, advised that he had had an accident while working for Safeway Stores. The Court does not believe it would be proper at this time to further impeach the plaintiff.” (RT, p. 344).

First of all, the records of Billings Clinic and its x-rays were admissible under the provisions of the Federal Business Records Act, 28 USCA 1732. Identification and foundation for the records had been waived by plaintiff (RT, p. 347). The records, reflecting prior physical conditions of plaintiff, were admissible not only on the question of causation, but on the question of credibility of plaintiff.

The District Court unfortunately confused plaintiff's problem in 1958 which Dr. Clayton Allard says he mentioned to him, with the one being offered from the Billings Clinic records of 1962. Therefore, they could not be cumulative. The record clearly shows that the “low back pain at a prior time” which the Court felt was cumulative was specifically identified by Dr. Clayton Allard in direct examination as being in 1958 (RT, p. 334).

The second ground given by the Court for its exclusionary ruling of these hospital records is also not supported by the record. It is true that plaintiff had admitted for the first time on cross-examination an accident while working at the Safeway Stores; however, he did not admit

that that affected his low back, as the District Court apparently thought in making its ruling. Specifically with regard to inquiry about an injury to his low back at the Safeway Stores, he stated as follows in cross-examination (RT, p. 168):

Q. "As a matter of fact, didn't you claim you hurt your low back in 1958 when you were working for Safeway lifting a box?"

A. "Not my low back. That was on my side."

Q. "Oh, on your side. Which side is it?"

A. "Right side."

Aside from their value on the question of causation if submitted to Dr. Clayton Allard, the records are clearly admissible as impeaching the credibility of plaintiff. The Court in ground No. 2 of its ruling expressed the view that it would not be proper "to further impeach the plaintiff". Defendant knows of no cases where a limitation has been imposed on how much impeachment may be permitted, particularly with a party. His credibility is always in issue. The mere fact he admitted one prior injury does not preclude showing others, especially where he has denied some.

Defendant submits that the records of the Billings Clinic impeach plaintiff in numerous respects, including: (1) his direct testimony that he had good health before, (2) his denial of prior back difficulty in cross-examination, (3) failing to tell Dr. Clayton Allard of the 1962 Billings Clinic low back difficulty, and (4) failing to tell Dr. Charles Cauty of the 1962 Billings Clinic low back difficulty. Their admission for impeachment would be justified if only one of those situations existed. Therefore, there can be no

doubt when four separate situations affecting the credibility of the plaintiff exist in connection with those records that they are properly admissible for the purpose of impeachment. *O'Shea v. Jewell Tea Co.*, 233 F.2d 530 (7th Cir. 1956); *Rivers v. Union Carbide Corporation*, 426 F.2d 633 (3rd Cir. 1970); *Marquez v. American Export Lines*, 384 F.2d 920 (2nd Cir. 1967).

The Court, after its initial refusal of the offer of the Billings Clinic records during plaintiff's case, did admit them when they were re-offered by defendant in its case in chief. This was because the plaintiff made no objection to the records at the time of their re-offer. The fact that the Court admitted these when re-offered in defendant's case does not cure the error of the refusal of the offer during plaintiff's case and the limitation put upon defendant by denying it the right to fully cross-examine Dr. Clayton Allard with those records, and to likewise limit, by the effect of its ruling, the cross-examination of Dr. Charles Canty.

The exclusion of expert and opinion evidence is reversible error where such exclusion is prejudicial to the substantial interests of the party offering it. The substantial rights of the party are generally held to be affected where the excluded evidence relates to a material point. *Kennelley v. Travelers Insurance Company*, 273 F.2d 479, 481 (5th Cir. 1960). Clearly it relates to a material point in this case, the physical condition of the plaintiff before the accident.

The right of cross-examination inheres in every adversary proceeding and it is established beyond any nec-

essity for citation of authorities. If cross-examination is not had, the party who is deprived thereof is deprived of due process. *Derewecki v. Pennsylvania R. Co.*, 353 F.2d 436, 442 (2d Cir. 1965); *Wisdom v. Stegall*, 70 So.2d 43 (S.Ct. Miss. 1954); *Pickerell v. Griffith*, 29 N.W.2d 588 (S.Ct. Iowa 1947). The importance and purpose of cross-examination are not to be minimized. See 5 Wigmore on Evidence (3rd Ed. 1940) § 1367.

There can be no doubt that Dr. Clayton Allard would have given a different opinion on the question of causation if defendant had been allowed to use the prior records of the Billings Clinic, and their x-rays. On redirect examination, Dr. Clayton Allard testified that plaintiff's x-rays, taken by him, showed a partial loss or straightening of the lumbar curvature, loss of lordotic curvature in the lumbar area, all due to the accident in question. But in recross-examination *he admitted that if he were shown an x-ray taken before the incident in question, showing the same thing, loss of lordotic curvature in the lumbar or low back, that that would change his opinion on whether this condition was caused by the accident* (Emphasis supplied).

Considering that the records of the Billings Clinic showed that when plaintiff was a patient there in 1962, he was diagnosed as having a low back sprain, questionable disc injury in the low back, with muscle spasm and straightening of the lumbar spine, can anyone seriously dispute that those findings might alter the opinion of Dr. Clayton Allard on the question of causation? These are the same conditions, to the same parts of the body, which

Dr. Clayton Allard had said on direct examination were caused by the accident in question. And yet, in spite of this, the District Court foreclosed this part of the cross-examination of Dr. Clayton Allard when it is apparent the same not only would have altered his testimony, but also may have altered the outcome of the case.

The refusal of the trial court to allow an offer by a defendant of a doctor's office record, even where the doctor could not see and tell what was on the record, was held to be prejudicial error. *O'Shea v. Jewell Tea Co.*, supra. There the Court recognized that the exclusion of such evidence went to the questions both of causation and credibility of the plaintiff. The Court in *O'Shea*, l.c. 532 said:

"Counsel for the defendant should have been given wide latitude in cross-examining the plaintiff in his attempt to show a prior injury and the treatment of that injury by Dr. Plice. If such an accident, injury and treatment by Dr. Plice had been shown it not only would have seriously reflected on the plaintiff's veracity but it might also have tended to show that the present condition of plaintiff's right foot was partially or wholly due to the injury suffered in the prior accident. The striking of this testimony of the plaintiff clearly constituted prejudicial error."

This same problem was before the U.S. Court of Appeals, Third Circuit in *Frank Mahon v. The Reading Company*, 367 F.2d 25 (3rd Cir. 1966). There, the trial court sustained plaintiff's objection to defendant's cross-examination of the plaintiff regarding a prior injury, and the Court of Appeals held this was reversible error. In doing so, the Court said, l.c. 27:

“Testimony of a prior illness is both relevant and material in a bodily injury action to an inquiry about later lost work time. Whether there is any causal connection existing between the two is for the jury to decide. *The issue of relevancy and materiality should not be confused with that of causation.* Of course, an illness may be too trivial and too ancient to have any reasonable probative value on the issue before a jury. But that cannot be ascertained in some instances until after inquiry is made. We think the trial court committed reversible error in refusing to permit the railroad to cross-examine plaintiff, who appeared as a witness on his own behalf, on possible prior illnesses, and also about the automobile accident injury and the cause of the scar on his forehead. *Segal v. Cook*, 329 F.2d 278, 280 (C.A. 6, 1962); *Vona v. Sylvester*, 22 Del.Co.Rep. 415 (C.P.Del.Co., 1930). If it should turn out that the railroad’s inquiries are nothing more than fishing expeditions, the journey will backfire in the eyes of the jury.” (Emphasis supplied).

A situation analogous to the rulings of the District Court’s limiting the cross-examination of plaintiff’s medical witnesses in the instant case was presented in *Young v. Terminal R.R. Assn. of St. Louis*, 70 F.Supp. 106 (D.C. E.D. Mo. 1947). There plaintiff claimed personal injuries to his back and spine and had admitted a prior fall from a scaffold, but he contended he recovered long ago. Plaintiff admitted he was disqualified for military service by Selective Service Board, but the Trial Court refused defendant’s offer of the plaintiff’s physical examination made by the examiners for the Selective Service Board. Recognizing its erroneous ruling, the Court granted a new trial and said, l.c. 111:

"Plaintiff's physical condition and the cause of it was the principal issue in the case. The physical condition of plaintiff at the time he presented himself for induction in the armed services in November, 1943, as shown by the report, bears directly upon this issue and tends to support defendant's position that plaintiff's condition, in whole or in part, existed prior to his fall in the cab of defendant's engine in April, 1945 . . . We do not think the record is admissible to impeach plaintiff as to what the examining physician told the plaintiff was the cause for his rejection but only to show plaintiff's physical condition at the time of the examination. The verdict in this case is for a substantial sum and was no doubt based upon plaintiff's claim as to the cause of his injury. We conclude that the refusal to admit the Selective Service record of plaintiff's physical examination was not only error but substantial error affecting the rights of the parties and cause for a new trial in this case."

The error of the District Court's refusal to permit full and complete cross-examination of Dr. Clayton Allard with the records of the Billings Clinic, and its x-rays, is re-emphasized and compounded because it of necessity extended to and included the same limitation upon the next medical witness called by the plaintiff, Dr. Charles Canty. This witness had made an examination of the plaintiff on behalf of Defendant, but he was called as a medical witness by plaintiff.

Dr. Charles Canty unqualifiedly based his opinion upon a denial by plaintiff of prior back trouble. When he was asked on direct examination the reason for his opinion establishing causation, Dr. Charles Canty testified that he "*questioned this man about previous back injury and he*

stated that he did not have any" (RT, p. 398) (Emphasis supplied). Therefore, it is glaringly apparent that the opinion expressed by this medical witness that the accident was a competent producing cause of plaintiff's condition might well have been different had defendant been permitted to question him on plaintiff's prior medical history.

Defendant did not re-offer the Billings Clinic records and its x-rays during the cross-examination of Dr. Charles Canty because defendant assumed, and had the right to assume, that that would have been a useless gesture, and the same is not necessary to preserve this point for appellate review. The ruling of the District Court would have been the same on the use of the Billings Clinic records to cross-examine Dr. Charles Canty as the Court had ruled during the cross-examination of Dr. Clayton Allard.

Where an objection has been made to certain testimony and is overruled, it is not necessary to repeat the objection when testimony of the same class is offered for one has the right to assume that the trial court's ruling will be the same. *Noteboom v. Savin*, 322 P.2d 916 (Ore. 1958); *Mountain States Creamery v. Tagerman*, 237 P.2d 532 (Cal.-App. 1951); *Bennett v. Gustorf*, 53 P.2d 91 (Mont. 1935). An offer of proof is not necessary to preserve an objection to a ruling of exclusion for review, where the offer of proof would be a useless gesture by virtue of the attitude of the trial court, or where the court had ruled broadly that evidence of a particular class or type or evidence in support of a theory or fact which the party is seeking to establish is inadmissible. *Beneficial Fire and Casualty Insurance Company v. Kurt Hitke & Co.*, 297 P.2d 428 (Cal. 1956); *Peterson v. Sundt*, 195 P.2d 158 (Ariz. 1948).

Defendant submits, as with the opinion of Dr. Clayton Allard on causation that had full and complete cross-examination been allowed with the records of Billings clinic, Dr. Charles Canty would have given a different view, been unable to give an opinion, or else qualified the opinion he gave on direct examination. Particularly is this true when Dr. Charles Canty had testified that the negative history of prior back injuries and difficulties given to him by plaintiff was the reason for his opinion. The extension of the District Court's ruling on the Billings Clinic records likewise limited defendant's cross-examination of this doctor, and compounds the error of the refusal to permit a full cross-examination with Dr. Clayton Allard.

Defendant cannot too strenuously urge to the Court the similarity of the findings shown by the records of the Billings Clinic, and the findings of the medical witnesses who attributed the same conditions to the accident. Those similarities were: (1) The records of Billings Clinic showed that in 1962 plaintiff had a straightening or loss of curvature of the lumbar or low back (RT, p. 341). Dr. Tom Malee made the same finding after the accident of 1968 (RT, p. 298), and so did Dr. Clayton Allard (RT, p. 348); (2) The records of Billings Clinic showed low back strain in 1962 (RT, p. 341), and Dr. Clayton Allard gave this as part of his diagnosis which he attributed to the 1968 accident (RT, p. 348); (3) The records of Billings Clinic showed muscle spasm in plaintiff's low back (RT, p. 341) - - - all three doctors, Dr. Tom Malee (RT, pp. 297, 298), Dr. Clayton Allard (RT, pp. 315, 316) and Dr. Charles Canty (RT, p. 380), found this after the 1968 accident. Yet, none of these doctors was allowed to consider the pre-

existing findings which could have changed their opinion on whether the 1968 accident caused what had obviously pre-existed that accident. And if it changed the opinion of one, or more than one, who can deny it would have altered the outcome of the trial?

The various cases set forth above, *O'Shea v. Jewell Tea Co.*, supra; *Frank Mahon v. The Reading Company*, supra, and *Young v. Terminal R.R. Assn. of St. Louis*, supra, all hold that the action of the District Court in refusing the records of the Billings Clinic denied defendant a full cross-examination on material points with expert witnesses and constituted prejudicial error. Where the right to present in full a party's view of the case, including interrogation of all witnesses, is denied, the error cannot be held to be harmless. 5 Am.Jur.2d, Appeal and Error, Section 783. *Wisdom v. Stegall*, supra. *Pickerell v. Griffith*, supra.

The Court erred in refusing the offer of the records of the Billings Clinic and their x-rays (Exhibits F and F-1) and in denying their use in the cross-examination of plaintiff's expert witnesses on the material point of causation of the damages claimed.

B

Refusal of Forsythe Hospital Records for Cross-Examination of Expert Witnesses.

Not only did the District Court refuse to admit the records of the Billings Clinic and its x-rays (Exhibits F and F-1) and deny defendant its full cross-examination of expert witnesses on those records, but it also refused defendant's offer of another set of hospital records which reflected the same complaints by plaintiff in 1958 as he

claimed from the 1968 accident. These, too, were offered during the cross-examination of Dr. Clayton Allard, and were the records of Rosebud Hospital, Forsythe, Montana (Exhibit L). Foundation and identification of those records were waived (RT, p. 356). They, too, were admissible under the provisions of the Federal Business Records Act, *supra*. But the District Court denied defendant's offer of these records, too (RT, p. 356), and thereby again denied defendant a full cross-examination of Dr. Clayton Allard and Dr. Charles Canty on the vital question of causation of the claimed injuries.

The records of the Forsythe Hospital (Exhibit L) showed complaints by plaintiff to the same areas of his body—neck, back and headaches (RT, p. 445)—as he claimed as a result of the accident in question. These covered a different time in 1958 than when plaintiff told Dr. Clayton Allard he hurt his low back. Even if they covered the same time, the fact that plaintiff mentioned that occasion to his doctor cannot limit the cross-examination of the doctor on the contents of those records. More medical data is obviously present for evaluation with the records themselves, than from the bare statement of plaintiff to the doctor that he had a brief period of difficulty in 1958 with his low back.

All of the reasons and authorities given by defendant with regard to the refusal of the offer of the Billings Clinic records, likewise apply to the refusal of the offer of the Forsythe Hospital records, for the Forsythe records, too, may have caused Dr. Clayton Allard to change or qualify his opinion regarding causation.

Again, as with the records of Billings Clinic, it is true that Dr. Charles Canty might have given a different opinion on causation if defendant could have used the records of Rosebud Hospital, Forsythe, Montana, in his cross-examination. But defendant, relying upon the District Court's ruling when it denied them in defendant's cross-examination of Dr. Clayton Allard, saw no reason to perform a useless act and offer again for cross-examination of a second medical witness what the Court had refused for the first one.

No one can seriously contend that if there are two separate sets of hospital records for different years, each of which reflects the same complaints to the same part of the plaintiff's body as claimed in this suit (neck and back), that Dr. Clayton Allard would not have given a different opinion if confronted with the first set of records, or the second set of records, or both, or that Dr. Charles Canty who testified he relied on plaintiff's statement to him that he had had no prior back difficulties would not have given a different opinion if confronted with one or both sets of records.

Again, it should be kept in mind that these two experts, Dr. Clayton Allard and Dr. Charles Canty, made the submissible case for plaintiff on causation of the injuries. If these prior records, Exhibit L, showing complaints in 1958, would cause these witnesses to retract their opinion on causation, then plaintiff would not even have a submissible case.

The refusal of the trial court to allow a medical expert to be cross-examined by the use of text books that he had not relied upon has been held to be prejudicial

error. *Abrams v. Gordon*, 276 F.2d 500 (D.C. Cir. 1960). There, the Court noted that causation was in issue. Certainly causation was, or should have been, in issue in the Herbert case, except as it was foreclosed by the Court in restricting defendant's cross-examination of expert witnesses.

The refusal by the trial court to admit one set of medical records has been held to be reversible error. *O'Shea v. Jewell Tea Co.*, supra; *Young v. Terminal R.R. Assn. of St. Louis*, supra. Can there, therefore, be any doubt that when the trial court refuses not just one set of hospital records, but also a second one, both predating the accident, and both of which show that injuries claimed, or the complaints made, had existed at some prior time, is clearly reversible error?

It is submitted that each and all of the decisions and authorities cited in Section A regarding the Billings Clinic records, including the excerpts from opinions, apply with the same force and effect regarding the Forsythe Hospital records, Exhibit L. To avoid repetition, defendant makes reference only to the applicability of the authorities cited in Section A.

Defendant submits that the District Court erred in its refusal of the offer of the Forsythe Hospital records (Exhibit L), and that the refusal of the Court denied defendant its right to a full cross-examination of plaintiff's medical witnesses and foreclosed it from showing that Dr. Clayton Allard, or Dr. Charles Canty or both may have given a different opinion on the question of the cause of plaintiff's claimed injuries.

II

The District Court Erred in Refusing to Admit the Hospital Records of Forsythe Hospital When Re-Offered by Defendant During Its Case.

The Court not only erred in refusing to allow defendant to cross-examine the medical witnesses in plaintiff's case with the Forsythe Hospital records (Exhibit L), but it compounded the error when it again refused those records when they were re-offered by defendant in its case in chief. As indicated under Sections A and B hereof, these records were admissible under the Federal Business Records Act, *supra*. The specific language thereof is:

"In any Court of the United States * * * any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such * * * record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

This Circuit has held that hospital records are admissible under the provisions of the Federal Business Records Act, *supra*. See *Medina v. Erickson*, 226 F.2d 475 (9th Cir. 1955). There, this Court stated, *l.c.* 482:

"The reports were made in the regular course of business and were required of the consulting physicians in order that they maintain the right to serve on the hospital staff. They were routine records relating to the internal operation and management of the hospital carrying out its prime function of giving medical or surgical care to ill or injured persons. There is no indication whatsoever that the reports were made for the purpose of 'litigating.' On the contrary, the professional integrity of the entrant was incased in the handwritten record of his examination, observation and the diagnosis, made at or near the time of the consultation. These reports bear the seal of trustworthiness, and in our judgment they are not based on speculation or conjecture. Having met the test of Section 1732, the reports were admissible even though they contained hearsay and denied to the Administratrix cross-examination of the entrants." (Cases cited).

At the time defendant re-offered these records of Forsythe Hospital (Exhibit L), the District Court refused them and stated:

"I am going to base the ruling on what I did yesterday. I don't think it is proper without the benefit of the doctor or nurse to testify, and as a result I will sustain the objection and refuse the exhibit." (RT, p. 446).

The record clearly shows that foundation for these records was waived at the time they were first offered in plaintiff's case (RT, p. 356), and again at the time they were re-offered in defendant's case (RT, p. 446). There is no requirement in the Federal Business Records Act that

they be connected up by a doctor or nurse, which was the only basis given by the Court for their refusal.

It is not required that hospital records be identified by the maker of the records. Circumstances relating to the maker of the records are relevant only to the weight of the evidence and not to their admissibility. *Gausсен v. United Fruit Company*, 412 F.2d 72 (2d Cir. 1969), l.c. 73. There, statements in the hospital records by the patient as to how his injury occurred were held admissible as business records. Significance was attached to the fact that the jury might well have given weight to those records in arriving at its decision. The verdict and judgment for the plaintiff in the *Gausсен* case was reversed and remanded.

There can be no doubt of the admissibility of these records (Exhibit L) on the question of credibility of plaintiff. His testimony, both on direct examination and on cross-examination, was clearly at war with and a denial of what was shown by portions of the Forsythe Hospital records. Defendant does not wish to burden the Court with quotations from the transcript. However, for the purposes of clearly illustrating the contrast in plaintiff's testimony and the Forsythe Hospital record entries which were offered and refused, defendant wishes to call attention to some of the specific conflicts. On direct examination, plaintiff's testimony was in part:

Q. "Now prior to this occurrence what was the condition of your health?"

A. "Outside of watching my diet for my ulcer, I had excellent health." (RT, p. 115).

Plaintiff was consistent with his direct examination, in denying prior difficulties, when he answered as follows in cross-examination:

Q. "Have you ever had any trouble before March 2, 1968, with your neck?"

A. "No, sir."

Q. "Never had any complaints about your neck any other times, have you?"

A. "As far as injuries, no, sir."

Q. "I mean where you had complaints, let's say while you were under medical care, you have never had that sort of thing before, have you?"

A. "Like I have got now, no sir."

Q. "No, not just like you have got now. Like any kind of neck complaints?"

A. "No, sir." (RT, pp. 144, 145).

* * *

Q. "All right, now I would like to ask you about your low back. Have you ever had a complaint about your low back before March 2, 1968?"

A. "No, sir."

Q. "And I assume if you did not have any complaint about your low back, you have, therefore, not had any medical attention for your low back?"

A. "No, sir."

Q. "Never had any complaint while you were under the care of any doctors, for your low back, have you?"

A. "No, sir." (RT, p. 146).

In contrast to the testimony set forth above, a specific portion of the Forsythe Hospital records, from the nurses' notes, was read into the record at the time of the re-offer of those hospital records (Exhibit L). Defendant did not restrict its offer of those records to only a portion of them, but did specifically refer in the records to the following language:

"Complaining of pain in the cervical and lumbar areas of back and lower right abdominal quadrant. Says he has steady dull headache." (RT, p. 445).

In addition to the above, defendant advised the District Court that there were other entries of a similar nature in that exhibit which attacked the credibility of plaintiff.

In *Horton v. Moore-McCormack Lines, Inc.*, 326 F.2d 104 (2d Cir. 1964), the defendant claimed as error on appeal the admission of evidence of a document from a hospital record. The Court stated, l.c. 107:

"The document appears to be a record made in the regular course of business and, therefore, admissible under the Business Records Act."

In *Harris v. Smith*, 372 F.2d 806 (8th Cir. 1967), the Court raised on its own motion a question involving hospital records under the Business Records Act. Both sides had apparently referred to the records during the course of trial and at the end of the trial, the plaintiff offered them in evidence. The trial court admitted them, but would not let the jury see the records. The Appellate Court ruled that the records were sufficiently identified. At page 816 the Court said:

"It must be borne in mind that the purpose of the statutory business records exception to the hearsay rule is to facilitate the admission into evidence of hospital records maintained during the course of the patient's treatment without requiring all persons who made an entry upon the record to take the stand."

The Court in the *Harris* case, *supra*, went on to hold that because of the significance of information contained in those records as it might affect the deliberation of

the jury, withholding them from the jury was erroneous and was one of the reasons given for the reversal and remanding for a new trial. It is likewise true here that because of the significance of the entries in the Forsythe records that they might have affected the deliberation of the jury, and thereby the outcome of the case.

In a very recent case it was held that exclusion of hospital records was reversible error. *Rivers v. Union Carbide Corporation*, supra. This was an admiralty case where one of the vital issues was whether the seaman was intoxicated, and the hospital records offered apparently showed he was a chronic alcoholic before and after the incident in issue. The Court held they were admissible under the Business Records Act, supra. See also *Johnson v. Mississippi Valley Barge Line Company*, 335 F.2d 904 (3rd Cir. 1969); *Gass v. United States*, 416 F.2d 767 (D.C. Cir. 1969).

The District Court erred in refusing to admit the Forsythe Hospital records (Exhibit L) when they were re-offered by the defendant in its own case.

III

The Cumulative Effect of the Refusal of the Court to Allow Cross-Examination of Medical Witnesses with the Prior Records and X-Rays of Billings Clinic and Records of Forsythe Hospital Together with the Refusal of the Court to Admit the Records of Forsythe Hospital When Re-Offered Constituted Prejudicial Error.

Finally, defendant submits that the refusal of the District Court to admit the records of the Billings Clinic and their X-rays (Exhibits F and F-1) and the records of

Forsythe Hospital (Exhibit L) during cross-examination of expert witnesses denied defendant a full cross-examination and that each of those refusals alone constituted prejudicial error. Further, the refusal of the District Court to admit the Forsythe Hospital records (Exhibit L) when re-offered in defendant's case also, by itself, constituted prejudicial error. But while each of those refusals by the District Court were alone prejudicial to defendant, there can be no doubt that the cumulative effect, the totality of each and all of those refusals together, constituted prejudicial error.

Defendant submits that the record and the numerous citations given previously, including *O'Shea v. Jewell Tea Co.*, supra, *Frank Mahon v. The Reading Company*, supra, and *Young v. Terminal R.R. Assn. of St. Louis*, supra, convincingly illustrate that the individual refusals referred to alone constituted prejudicial error. In spite of the applicable authorities already cited to the effect that each of those incidents constituted prejudicial error, there should be no question where one or more of several incidents of error standing alone might for some reason be deemed harmless error, that when they are considered together, their cumulative effect is deemed prejudicial error. *Ryan v. United Parcel Service, Inc.*, 205 F.2d 362, l.c. 365 (2nd Cir. 1953); 5 Am.Jur.2d, Appeal and Error, Sec. 789; *Coyner Cropdusters v. Marsh*, 372 P.2d 708 (S.Ct. Ariz. en banc 1962). In *Ryan v. United Parcel Service, Inc.*, supra, the United States Court of Appeals for the Second Circuit stated, l.c. 365,

"Although perhaps no one of the errors standing alone would call for reversal, in their totality, they do."

It is not simply that the District Court erred in refusing complete cross-examination of Dr. Clayton Allard with: (a) the records of the Billings Clinic showing the same conditions as claimed by plaintiff, and (b) the records of Forsythe Hospital, likewise showing prior complaints and conditions corresponding to those now claimed. Nor is it simply the refusal which necessarily followed from the ruling during Dr. Clayton Allard's cross-examination which denied a complete cross-examination of Dr. Charles Canty on (a) the records of the Billings Clinic showing the same conditions as claimed by plaintiff, and (b) the records of Forsythe Hospital, likewise showing prior complaints and conditions corresponding to those now claimed. Nor is it simply the refusal of the District Court to admit the records of Forsythe Hospital when they were re-offered in defendant's case and when they clearly showed a conflict between plaintiff's testimony about the prior conditions of his neck and back in contrast to the entries in those records. Each of those situations alone and the rulings made by the District Court constituted prejudicial error, but the cumulative effect of those rulings can leave no doubt that defendant was not able to fully cross-examine on questions of causation the only expert witnesses who made amissible case and further was precluded from thoroughly impeaching the plaintiff with respect to clear contradictions between prior records and his testimony.

If for any reason the several refusals by the Court when standing alone did not in and of themselves constitute prejudicial error, when considered in toto, they clearly do.

CONCLUSION

Because the District Court erred: (1) in refusing the admission of prior hospital records of probative value (Billings Clinic and Forsythe Hospital) and their use in cross-examination of two expert witnesses on the question of causation of claimed damages, and on the credibility of plaintiff; (2) in refusing to admit hospital records when they were re-offered in defendant's case; and (3) because of the cumulative effect of the District Court's refusals of the admission and use in cross-examination of hospital records and refusal of the District Court to admit the Forsythe Hospital records in the defendant's case, the defendant requests the United States Court of Appeals for the Ninth Circuit to reverse the verdict and judgment in favor of plaintiff in the District Court and remand this cause back to that Court for a new trial.

Respectfully submitted,

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FILED

IN THE

UNITED STATES COURT OF APPEALS

JAN 25 1972

FOR THE NINTH CIRCUIT

WM. B. LUCK, CLERK

NO. 71-2602

CLIFFORD N. HERBERT,

Plaintiff-Appellee,

-vs-

MOBIL OIL CORPORATION,
a corporation,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLEE

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 71-2602

CLIFFORD N. HERBERT,

Plaintiff-Appellee,

-vs-

MOBIL OIL CORPORATION,
a corporation,

Defendant-Appellant.

BRIEF OF APPELLEE

ISSUES PRESENTED FOR REVIEW AND STATEMENT OF THE CASE

Appellee accepts Appellant's presentation of these matters.

STATEMENT OF THE CASE

Appellee is not satisfied with the statement of the case presented by Appellant and therefore will restate the facts of this lawsuit as they appear from the record herein. (For clarity Appellant will be referred to as "Defendant" and Appellee as "Plaintiff").

At the time of the accident which gave rise to the instant

case the Plaintiff, Clifford Herbert, resided in Glendive, Montana, a small town in the Eastern part of the state.

(RT 97) Mr. Herbert was employed by Houck Transport Company as a truck driver hauling petroleum products and occasionally hauled gasoline to a bulk plant owned by the Defendant Mobil Oil Corporation at Beach, North Dakota.

(RT 204)

On the day in question, March 2, 1968, Mr. Herbert drove to Beach, North Dakota with a load of gasoline for delivery to Defendant's bulk plant per Defendant's order.

(RT 205) Mr. Herbert first obtained the key to the bulk plant from the Mobil filling station in Beach, and then proceeded to the bulk plant. In the course of transferring the gasoline from his truck to the storage tanks at Defendant's bulk plant it was necessary for Mr. Herbert to walk on a wooden platform or loading dock located adjacent to the storage tanks. (RT 108) This loading dock has wooden stairs at each end and is approximately three feet ten inches from the ground. (RT 204,443) The stairs had been in place without repair for some thirty (30) years and were in constant use. (RT 232) Just a few days prior to the day in question, on February 28, 1968, David Reed,

an employee of Defendant who had responsibility for reporting and repairing possible safety problems with such installations as Defendant's bulk plant at Beach, North Dakota, ordered replacement of the steps at both ends of the loading dock and the installation of hand rails (RT 205) since he found the steps to be defective. (RT 280) At this time Mr. Reed posted no warning device or notice to indicate the unsafe condition of these steps. (RT 280, 281)

Upon completing the unloading process Mr. Herbert walked to the end of the platform and started down the east steps. As he placed his weight on the top step, the step gave way and he fell to the ground between the loading dock and his truck which was parked parallel to the platform. (RT 108)

Stunned initially by his fall, Mr. Herbert recovered to find his head was against the wheel of the truck and his legs elevated and resting against the side piece of the steps from which he had fallen. (RT 109) Mr. Herbert examined the stairs and noticed that the top step was broken, a fact which was confirmed by an employee of the Mobil Oil distributor in Beach, North Dakota, immediately following the accident. (RT 205)

Mr. Herbert advised an employee of Defendant's distributor in Beach that he had injured himself in a fall (RT 205) and drove his truck back toward Glendive, Montana. He experienced increasing pain and discomfort, especially to his neck and back, on the return trip and upon arriving in Glendive he contacted Dr. Tom Malee, a general practitioner in that city. (RT 110)

Dr. Malee immediately ordered Mr. Herbert hospitalized. (RT 110) His examination indicated "no bony pathology" revealed by x-rays (RT 295) but he did note that Mr. Herbert was in "terrific pain" and that he had "terrific muscle spasm". This muscle spasm was not localized but extended over his entire spine and was "obvious" from the way Mr. Herbert moved. (RT 297, 300). Dr. Malee treated Plaintiff with muscle relaxant drugs, infrared heat and absolute bed rest on a hard bed. (RT 297) Mr. Herbert remained hospitalized under Dr. Malee's care from March 2 to March 11, 1968, at which time he was transferred to Billings, Montana by air ambulance so that he could be seen by Dr. Clayton Allard, an orthopedic surgeon, for specialized evaluation. (RT 300, 301) Dr. Malee's final diagnosis was traumatic myositis -- he did not treat Plaintiff again following Mr. Herbert's transfer to Billings, Montana.

(RT 299)

Mr. Herbert was hospitalized in Billings under the daily care of Dr. Allard for some eighteen days: March 11 to March 29, 1968. (RT 309) At the time Mr. Herbert first came under Dr. Allard's care the doctor found on examination that he was mildly tender over the spinous processes of the vertebrae from C-4 to D-1 and at the level of D-6. (RT 309) He was also moderately tender over the spinous processes of the lower lumbar vertebrae, the lumbosacral area and over the erecta spiney muscles adjacent to those areas. Leg tests were positive for lumbosacral pain. (RT 309, 310)

Following this period of hospitalization Dr. Allard continued to follow and treat Mr. Herbert. He noted that Mr. Herbert continued to have pain in his low back with radiation down both legs and pain in the region between his shoulder blades which radiated up through his neck. The Plaintiff had constant neck pain accompanied by frequent headaches. (RT 310) On his last visit to Dr. Allard before the trial the doctor noted the symptoms set out above and found that Mr. Herbert had diffused tenderness of the spinous processes of the entire cervical region down to the mid-dorsal area, with the worst pain

occurring at the level of C-7, D-1. He had tenderness in the muscles adjacent to those areas. (RT 311) The trapezius muscle was tender to a milder degree. (RT 311) The doctor noted that Mr. Herbert experienced pain in the base of the neck with extremes of neck motion. (RT 312) He also had tenderness in the lumbar spine from L-3 and below -- the pain being worst in the lumbosacral area. Motions of the lower back were approximately 75% of normal with pain being produced at the extremes of all these motions. (RT 312) Leg tests were again positive for lumbosacral pain and produced pain in the low back and some pain in the legs. X-rays showed straightening of the cervical and lumbar lordosis due to muscle spasm and some spurring of the vertebrae in the dorsal and lumbosacral spine. (RT 314, 316, 348) On Mr. Herbert's first hospitalization in Billings following the accident (March 11, 1968), the x-rays taken revealed neither spurring of the vertebrae nor loss of the normal lordotic curvature of the spine -- but rather showed that Plaintiff had a perfectly normal spine with no changes noted. (RT 350, 371)

Dr. Allard's diagnosis was that Mr. Herbert's condition was caused by a chronic dorsal sprain due to tearing of the ligaments in the dorsal spine and a chronic lumbar

strain. (RT 316, 318) When asked, the doctor's opinion was that these conditions were caused by the Plaintiff's fall from the loading dock and that these conditions were permanent in nature. (RT 321) The doctor recommended that Plaintiff give up truck driving or other types of work involving lifting, twisting, carrying, pushing, pulling or carrying to any extent. (RT 320) He also indicated that he felt Plaintiff should not engage in bowling, horseback riding or motorcycle riding. (RT 321, *et seq.*) It was the doctor's opinion that his clinical findings were a sufficient basis to support the pain and discomfort which Mr. Herbert testified he had following the accident. (RT 322)

Prior to trial Mr. Herbert was examined by Dr. Charles R. Canty, an orthopedic surgeon, on behalf of Defendant Mobil Oil Corporation. (RT 379) Over a year following the accident Dr. Canty noted on visual examination that Plaintiff didn't move in a normal manner, was unable to move his back in a normal range of motion, evidenced muscle spasm in his back, and had a list. Dr. Canty characterized these symptoms as "objective signs of a person with a back ailment." (RT 380) Dr. Canty's examination showed that Mr. Herbert had a 30% loss of the normal range

of motion in his back. (RT 381) On spine percussion Mr. Herbert's back was tender, with the focal point of this tenderness being at the level of D-4. (RT 383) X-ray examination revealed a pronounced narrowing of all disc spaces in the dorsal area of the spine with evidence of calcific bridging of the disc spaces anteriorally. (RT 385) In the lumbar spine the disc spaces were normal but there was evidence of early osteophitic calcification of the upper spaces. (RT 385) Some evidence of spurring of the vertebral bodies was noted in the upper dorsal and lower cervical areas. (RT 387) There was a reversal of both the cervical and lumbar lordotic curvature due to muscle spasm produced by nerve root irritation. (RT 385, 387, 391) In Dr. Canty's opinion nerve root irritation in the dorsal spine was producing many of these symptoms. He explained that significant pain in the dorsal area of the spine, such as Mr. Herbert evidenced, will cause a person to "splint" his entire back. (RT 391) His formal diagnosis of Mr. Herbert's condition was early osteoarthritis of the dorsal spine. (RT 392) Dr. Canty recommended an occupation for Mr. Herbert which would entail very little physical exertion and indicated his opinion that Mr. Herbert's difficulties resulted in a

permanent partial impairment. (RT 399) Again, Dr. Canty testified that his findings were a sufficient basis for the pain and difficulty which Mr. Herbert experienced following the accident. (RT 398)

Mr. Herbert testified at trial that prior to the accident he enjoyed excellent health except for an ulcer condition. (RT 115) He had no back or neck pain such as he experienced following the accident. (RT 115) Prior to the accident Mr. Herbert testified that he had been continuously employed in occupations requiring heavy manual labor as a laborer for a creamery (RT 116), member of a seismographic crew (RT 117, 118), clerk and assistant manager for Safeway Stores (RT 118), meat cutter (RT 119), construction worker (RT 119), body shop employee (RT 120), and since 1961 as a truck driver for Houck Transport Company (RT 120). Mr. Herbert testified that his driving duties entailed heavy work in handling the 35 ton truck itself, changing truck tires and in shoveling the truck out of snow during winter operations. (RT 122, 123, 125) In the seven years prior to the accident Mr. Herbert testified that he was employed continuously except for a brief period when he had a broken wrist. (RT 120) Since the time of the accident Mr. Herbert stated that he had not worked

except for a two (2) week period during which he "checked out the tills" for a service station owner who was on vacation. This employment did not entail work as a service station attendant or any heavy manual labor. (RT 127)

Following the accident, Mr. Herbert enrolled in a junior college part time and continued to attend classes regularly to the time of trial. (RT 170)

Plaintiff also testified at trial that prior to the accident he enjoyed hunting, some fishing, horseback riding, motorcycle riding, bowling, and other vigorous sports.

(RT 132) Mr. Herbert stated that following the accident he had been unable to engage in any of these activities.

(RT 133-135) Mr. Herbert stated that he was able to shoot a deer from the road but indicated he needed the assistance of another person to drag the carcass in and place it in his truck. (RT 135) Plaintiff testified he was able to drive his automobile on short trips but experienced increased neck and low back pain on long automobile trips.

(RT 136, 137)

Surveillance movies (Plaintiff's Exhibit 10) obtained by Defendant showed Plaintiff working in his garden and moving some irrigation pipe. The evidence at trial showed that the pipe involved was so light a small child could

have lifted it without difficulty. (CT 423) Mr. Herbert testified that he did none of the heavy work of the small garden and that his only contribution to the family garden was in supervising the laying of the light irrigation pipe and connecting the pieces together which he did twice per year. Other items which the movies showed Plaintiff handling were shown at trial to be extremely light and capable of being handled with little or no exertion. (RT 94-101)

On cross examination and in its case in chief Defendant investigated fully all of the occasions prior to the accident when Mr. Herbert had consulted physicians. In response to Defendant's questions Mr. Herbert stated that in 1957-1958, ten years before the accident in question, he had had an episode while living in Forsyth, Montana where he contracted a flu-like virus which produced severe vomiting. He was hospitalized at that time in Forsyth, Montana by a Dr. Whitney. (RT 147) Plaintiff testified that during the period he was afflicted by this ailment his entire body hurt, although his major discomfort was centered in his legs. (RT 150,154) After some weeks, Mr. Herbert was transferred to a hospital in Billings, Montana by ambulance so that he could be seen by a specialist. (RT 148) During his hospitalization in Billings he was given whirlpool treatments

and exercises to build up the muscles in his neck, back and legs. Following ten (10) days in Billings Mr. Herbert was transferred by his employer, Safeway Stores, Inc., to Cody, Wyoming for additional and similar treatment. (RT 153) Plaintiff testified that the specialist in Billings advised him that the virus he had contracted came from drinking whole (unpasteurized) milk and stated that he made a full and complete recovery from this ailment. (RT 189, 190)

During the cross examination of Dr. Allard Defendant offered into evidence hospital records from Plaintiff's hospitalization in Forsyth, Montana for this condition. Plaintiff objected to this exhibit on grounds that the ailment from which Plaintiff suffered in 1958 was in no way connected to Plaintiff's present complaint and that without a doctor's testimony to connect the statements in the records to the instant case such records were inadmissible and highly prejudicial. (RT 354-356) This offer (Exhibit L) was refused by the District Court. (RT 356) This Exhibit was again offered in Defendant's case in chief at which time counsel for Defendant read into the particular part of the record he felt was relevant, viz: "White male admitted ambulatory -- accompanied by wife.

Complaining of pain in cervical and lumbar areas of back and lower right abdominal quadrant. Says he has steady dull headache." (RT 445) Defendant again objected and indicated to the Court that if Defendant would call the doctor who treated Plaintiff he would explain that this episode in 1958 in no way contributed to Plaintiff's present difficulties. Again this offer was refused by the District Court. (RT 446) An offer of proof was not made.

Mr. Herbert admitted that he had had an accident in 1958 while working for Safeway Stores which occurred when he fell against a box while carrying a quarter of beef. (RT 194) He stated his right side just below the right shoulder blade was injured but testified that he made a full and complete recovery from this incident and returned to work after a two (2) day absence. (RT 195)

Defendant Mobil Oil Corporation also called Dr. William Danner, from Sidney, Montana, the Plaintiff's family doctor. The doctor was interrogated concerning all visits made to him by Plaintiff and the ailments he complained of at those times. He testified that in July of 1961 Plaintiff was hospitalized with a ruptured blood vessel which occurred when a horse fell on him. (RT 409-410) Plaintiff made a full recovery from this occurrence. (RT 424)

In June of 1962, Mr. Herbert was hospitalized with an abdominal condition which could not immediately be diagnosed. (RT 411) He had consulted Dr. Danner about this condition earlier and was only hospitalized when he began to show blood in his stools. (RT 409, 411) Not being able to make a definitive diagnosis Dr. Danner referred Plaintiff to a Dr. Mohs in Billings, Montana. (RT 411) Dr. Mohs replied to Dr. Danner by letter, which Dr. Danner read in part at the trial. (RT 412, 421) Dr. Mohs stated that in his opinion Mr. Herbert had a Meckels diverticulum. He also felt that Plaintiff had a low back strain with a questionable disc at L4-L5 and noted that there was evidence of muscle spasm in the lumbar spine with some straightening of the normal curvature. (RT 412) Regarding the diagnosis of low back strain Dr. Danner indicated that diagnosis in this instance was difficult since Mr. Herbert had pain over the lower abdomen which radiated into the back. (RT 426) He stated that as far as he knew if there was in fact a strain it went away, and that no absolute diagnosis of any disc pathology was ever made. (RT 427)

Following his return to Sidney Dr. Danner performed exploratory surgery on Mr. Herbert for his abdominal condition during the course of which he found that Mr.

Herbert had regional ileitis which affected his small bowel. (RT 413) The doctor testified that Mr. Herbert did well post operatively and was released to return to work. (RT 414)

In August of 1962 Dr. Danner gave Plaintiff a physical examination to qualify him for truck driving. Plaintiff passed this examination and the doctor's report indicated he found Plaintiff to have no permanent defects as a result of disease or accident and that he had no head or spinal injuries. (RT 430)

In January of 1963 Dr. Danner administered three ultrasonic treatments to Plaintiff which were required after Plaintiff had fallen while working and suffered a contusion of his upper back and neck. (RT 414-415)

In July of 1965 Plaintiff again passed his physical for truck driving with Dr. Danner making negative findings as in the 1962 exam, and in November of 1965 Plaintiff underwent a general physical examination with normal findings. (RT 416-417) Plaintiff had additional abdominal trouble in January of 1969 and was hospitalized for barium x-rays. (RT 417) Plaintiff never consulted Dr. Danner for his back troubles. (RT 422)

Prior to the testimony given by Dr. Danner and during the examination of Dr. Allard Defendant sought to intro-

duce records and x-rays of the Billings Clinic (Defendant's Exhibit F and F-1). These records contained the diagnosis and findings of Dr. Mohs regarding "low back strain" and questionable disc which he found when evaluating Mr. Herbert's abdominal problem. (RT 335) Plaintiff objected to the introduction of these records on grounds that the complaints Mr. Herbert had at that time were unrelated to the injury which forms the basis of the instant lawsuit. (RT 337) Defendant called the Court's attention to the fact that without a doctor to testify who would be competent to relate the diagnosis and findings contained in the records to the present injury the records were inadmissible. (RT 338, 340) The District Court sustained the objection to Exhibits F and F-1 during the testimony of Dr. Allard -- however, following the testimony of Dr. Danner, and his reference without objection to the findings of Dr. Mohs, Exhibit F was introduced in evidence without objection during Defendant's case in chief. (RT 444) Exhibit F-1 (x-rays) was not reoffered. Dr. Allard was still under the Court's Subpoena at this time and available for testimony. (RT 373-374)

Submission of the cause to the jury resulted in a verdict in favor of Plaintiff. (RT 527) A Motion for a

New Trial was overruled by the trial Court. (CR 421) In its Opinion and Order denying this Motion the trial Court set forth its reasons for excluding Defendant's Exhibit F, F-1 and L when they were offered during the cross examination of Dr. Allard. The Court stated that the foundation for entry of the records had not been laid by Defendant and that the foundation had only been waived in part -- the part relating to identification of the records as being the records of the particular institution from which it was alleged they had come. (CR 424, see also RT 346) It was the Court's position that unless Defendant was prepared to relate the complaints set forth in the records with the Plaintiff's present injuries, the records were not admissible. If the records were admitted without such a connection being made, and if the Defendant then failed to make such a connection -- substantial prejudice to Plaintiff would have occurred which could not have been cured by cautionary instructions to the jury. (CR 424-425) The Court noted that Defendant had means available to have the records or their contents admitted without the risk of this prejudice and should have proceeded in this fashion. (CR 425)

SUMMARY OF ARGUMENT

The testimony in the instant case clearly shows that prior to March 2, 1968, the date on which Plaintiff fell from Defendant's loading dock, Mr. Herbert was in good health. Mr. Herbert had experienced some previous medical problems but testified he had made a complete recovery except for an ulcer condition which occasionally flared up. At the time of the accident Plaintiff had been employed continuously for seven years driving heavy trucks and performing heavy manual labor. He had passed physical examinations given by his family doctor in 1962 and 1965 to qualify him for his employment. In addition, his family doctor had administered a general physical examination to Mr. Herbert in the Fall of 1965 with normal findings.

On February 28, 1968 Defendant's employee discovered the defective condition of the thirty-year-old stairs at Defendant's bulk plant in Beach, North Dakota and ordered their replacement. He did not, however, order any warning posted of this defective condition. Three days later while the stairs were still in this defective condition, Mr. Herbert suffered a fall when the top step of these stairs gave way and sustained an injury. The fall and injury were reported and the existence of the broken step was confirmed.

On this same day Plaintiff consulted a doctor in his hometown and was found to be in terrific pain and to be experiencing terrific muscle spasm in his back. Plaintiff was hospitalized for a brief period and then transferred to Billings, Montana so that he could be evaluated by a specialist, Dr. Allard. This doctor testified that Plaintiff evidenced back problems at this time and kept him hospitalized under daily care for some eighteen days. Dr. Allard continued to follow and treat Mr. Herbert's condition and at the time of trial testified that Plaintiff was suffering from a serious and permanent dorsal spinal injury caused by his fall which would prevent him from engaging in occupations requiring heavy physical labor or recreational activities of a vigorous nature. Dr. Canty, who examined Plaintiff on behalf of Defendant, also testified that Plaintiff had a serious injury to his dorsal spine and recommended that he engage in only sedentary activities not requiring physical exertion.

Faced with this Defendant now claims that because he was not permitted to use certain clinic and hospital records in cross examining Drs. Allard and Canty, reversible error was committed below. These records, called herein the "Forsyth" records and the "Billings Clinic"

records, related to times when Plaintiff was hospitalized ten and six years prior to the accident in question respectively. Defendant first sought to introduce these records during Plaintiff's case in cross examination of Dr. Allard. These records were not referred to during the direct examination of Dr. Allard and naturally Defendant had presented no foundation for the records, nor had it indicated how they related to Plaintiff's present injuries. Plaintiff objected to the use of these records without a witness being called who could testify as to foundational material, i.e. who would testify as to how the records were prepared and kept and how they related to the issues in the instant case. Since Defendant was in no position to lay such a foundation during Plaintiff's case the records were properly refused by the District Court. Their use would have exceeded the scope of the direct examination and would have amounted to improper cross-examination. A review of the entire record in this case indicates clearly that even if such records could be properly admitted, they were totally irrelevant in that there is no testimony at all purporting to connect the contents of these records with Plaintiff's present medical complaints.

And finally, any error in the District Court's re-

fusal to admit these records would amount to harmless and not reversible error. Plaintiff testified on cross examination that he was hospitalized in Forsyth with a flu-like ailment which produced pain in his entire body, that he was treated at three different locations for this ailment, and that he made a complete and total recovery. The entire Billings Clinic record was admitted during Defendant's case in chief. Thus it is clear that the material which Defendant desired to bring to the attention of Drs. Allard and Canty was admitted in evidence and Defendant had merely to recall the doctors and conduct such further examination as he desired.

No reason appears why Defendant could not have followed this procedure. In fact, at Defendant's request the District Court had required Dr. Allard to remain available for possible further testimony. This course of action would have been the proper one for Defendant to follow in any event if Defendant truly believed these records had the probative force it now ascribes to them. Defendant was in no position to lay the necessary foundation for their admission during Plaintiff's case. If it desired to use such reports in cross examination of the doctors which Plaintiff called Defendant should have called the wit-

nesses who could have testified as to foundation and who could have established the relevancy of these records to the instant case (a task which Plaintiff submits would have been impossible) and then had the records admitted. Drs. Allard and Canty could then have been recalled and examined concerning these records. The District Court was correct in refusing the offer in evidence of both sets of records when they were submitted in Plaintiff's case and in refusing the offer of the Forsyth records when they were submitted in Defendant's case.

ARGUMENT

I. RECORDS OF THE FORSYTH HOSPITAL AND BILLINGS CLINIC WERE CORRECTLY EXCLUDED BY THE DISTRICT COURT WHEN OFFERED IN PLAINTIFF'S CASE IN CHIEF

During its cross examination of Plaintiff's medical witness, Dr. Allard, Defendant sought to attack the doctor's testimony -- in response to a hypothetical question -- that in his opinion Plaintiff's present dorsal spine injury was caused by his fall on Defendant's premises at Beach, North Dakota. In pursuing this attack Defendant attempted to introduce certain records from the Rosebud Community Hospital in Forsyth, Montana (1958) and from the Billings Clinic (1962), which had not been referred to in the doctor's direct examination. These records contained

references to Mr. Herbert which Defendant felt impeached Plaintiff's assertion that he was in good health prior to the accident and attacked Dr. Allard's testimony on causation because they showed that Plaintiff had pre-existing medical ailments which were causing his current symptoms. Following an objection by Plaintiff primarily based on the lack of relevancy of these items to any issue in the instant case (about which Plaintiff will have more to say in a later section of this Brief), the District Court refused the offer of both sets of records. While it did not offer to do so, in his Brief Defendant states that he would have utilized these records in cross-examining Dr. Canty had they been admitted.

From its Order denying the motion for a new trial it is apparent that the thrust of the District Court's reasoning in sustaining the objection to these records had to do with relevancy. In its Brief Defendant has much to say about the remarks the Court made from the bench in sustaining Plaintiff's objection to these records. However, it can be readily seen that at the time they were first offered both of these documents were objectionable since they went beyond the scope of the direct examination -- and this is assuming *arguendo* that their admissibility (foundation and relevancy) could somehow have been established without any

testimony. Thus, these records could properly have been excluded on this procedural ground regardless of what other infirmity they might have and the rule is recognized everywhere that if the trial court correctly excludes evidence, but for the wrong reason -- its rulings will not be disturbed on appeal. See 5 Am. Jur. 2 Appeal and Error, §785; 5A C.J.S. Appeal and Error, §1739 and the many cases there cited.

At the time these records were offered during the cross examination of Dr. Allard they had not been referred to on direct examination and they were therefore not the subject or proper cross examination. The scope of cross examination is generally restricted to matters inquired into on direct. *Lewis v. U.S.*, 373 F.2d 576, Cert. Den. 389 U.S. 880 (9 Cir. 1967). Even if Plaintiff's trial counsel was willing to stipulate these records into evidence their use would still have been objectionable as exceeding the scope of direct examination.

There was a proper procedural course for Defendant to follow if it really desired to use these records in examining Dr. Allard. Even under the Federal Shop Book Act (28 U.S.C.A. §1732) a proper foundation must be laid for the admission of hospital records. *Medina v. Erickson*,

226 F.2d 475, 482 (9 Cir. 1955). It is obvious that during the Plaintiff's case Defendant is going to be in no position to lay this foundation since he cannot call witnesses who can testify that the records were kept in the regular course of business and the notations made at or near the time of the observations nor can he demonstrate the relevancy which is required before any evidence can be admitted. Dr. Allard could not have furnished such testimony. Therefore, under normal procedure Defendant must ask the Court to hold the witness for testimony in its own case, as the Defendant here in fact did with Dr. Allard (RT 373-374), then lay the foundation for admission of the records if he can, recall the witness and conduct whatever examination he chooses. There is no prejudice to Defendant involved in such a procedure which is merely a normal incident of the trial of any lawsuit. Had it really desired to do so, Defendant could have followed this course of action with the Billings Clinic records in this case since they were admitted in evidence in Defendant's case in chief -- at a time when Dr. Allard was still available to testify.

The District Court excluded these records during Plaintiff's case because it felt that they would not be connected by competent testimony to the instant case and Defense

counsel gave the Court no assurance he would make such a connection. As Plaintiff will demonstrate, the records were irrelevant and would have been properly excluded on that ground. However, their use would have permitted Defendant's cross examination to far exceed the scope of the witness' direct testimony and the records were objectionable on this procedural ground alone. In view of this no error can be predicated on the District Court's evidentiary rulings in this regard.

II. RECORDS OF FORSYTH HOSPITAL WERE CORRECTLY EXCLUDED BY THE TRIAL COURT AS THEY WERE TOTALLY IRRELEVANT TO THE ISSUES IN THE INSTANT CASE

On this appeal Mobil Oil Corporation would like to convince this Court, as it attempted to convince the jury below, that at the time Plaintiff suffered a fall on Defendant's premises he had pre-existing medical ailments which were producing the symptoms from which even Defendant's physician recognized he was suffering. In support of his theory Defendant sought to impeach the diagnosis made by Dr. Allard regarding the causation of Plaintiff's injuries by introducing records from the Rosebud Community Hospital in Forsyth, Montana. (Exhibit L) An offer of proof was not made so that these records are not available for the Court's review. However, when these records were offered in the Defendant's case in chief Defendant's counsel

read the portion of the records he felt was particularly pertinent. The records suggest that when Mr. Herbert was admitted to the Forsyth Hospital in 1958 he was complaining of pain in the cervical and lumbar areas of his back and had pain in lower right quadrant of his abdomen and that the physician who treated him felt he possibly had polio. (RT 445-446) Plaintiff objected to the introduction of these records both during the cross examination of Dr. Allard and in Defendant's case because it was Plaintiff's position that these complaints had nothing to do with the present injury suffered by Plaintiff and the records were therefore irrelevant. Plaintiff also objected because no physician was being called who could relate these complaints to the present injury and because the doctor who made the diagnosis contained in the records was not called and was not available for cross examination. The District Court sustained Plaintiff's objection on both occasions.

In its Opinion and Order denying the motion for a new trial the District Court noted that unless these complaints were "connected up" to the present injuries they would be irrelevant and would be highly prejudicial to Plaintiff. The full record clearly shows that this occurrence of ten years prior to the accident in question was not connected with the Plaintiff's present complaints. The most that

could be made from these records is that ten years prior to the accident Plaintiff had pain in his back. It would be a long jump to connect this symptom with the dorsal spine injury which, according to Drs. Allard and Canty, is causing Plaintiff's present medical difficulties.

Plaintiff testified that at the time these records were made, some ten years before the accident, he entered the Forsyth Hospital suffering from a flu-like virus which produced excessive vomiting and caused him to ache all over his body. His principle complaints were related to his legs. Following his stay in the Forsyth Hospital he was transferred to Billings, Montana to be evaluated by a specialist -- from which it is fairly inferable that he was not progressing as desired in Forsyth and that additional diagnosis and workup was desired. Plaintiff testified that the specialist advised him that his symptoms were caused by a virus which he had contracted from drinking whole (unpasteurized) milk. Yet Defendant did not offer any records or medical testimony from hospitals or doctors in Billings, Montana, the place of trial, to support his theory that this episode of ten years prior to trial had some relation to Plaintiff's injuries. Plaintiff testified that he was treated at three different locations for

this problem yet Defendant wanted to use the bare records from the small town hospital where Plaintiff was first seen and ignore any other evidence concerning this ten year old problem. Defendant asked the trial court to permit him to cross examine with evidence which was very likely to be irrelevant (simply on the basis of the time lapse involved) with no showing that he could connect it to the present injury. This attempt on the part of Defendant was properly refused.

The proposition that evidence of prior injuries or illness must be related to the injuries involved in the current lawsuit in order to be relevant and therefore admissible is universally accepted.

"Evidence showing that plaintiff had suffered an injury as a result of an occurrence which took place before the accident in question ordinarily is inadmissible unless a causal connection between such injury and the accident or injury in question is established."
25A C.J.S. Damages, §147

In *Pellegrini v. Chicago Great Western Railway Company*, 319 F.2d 447 (7 Cir. 1963) Plaintiff suffered injuries (primarily mental or emotional) when the door of a railway car broke loose and fell upon him. Defendant was permitted by the court to introduce evidence that Plaintiff had been shot in the back fourteen years prior to the

occurrence in issue and to ask a medical witness who had treated Plaintiff for his present injuries a hypothetical question as to whether or not this might have contributed to Plaintiff's present injury. The doctor replied that, "There might or could be a causal connection." The court held that unless there was some showing that this former occurrence was causally related to the present injury the admission of such evidence was "clearly erroneous." The equivocal statement of the doctor set forth above was found to be inadequate to supply the necessary causal link.

In *Marbut v. Costello*, 34 Ill. 2 125, 214 NE 2d 768 (1965) it appeared that plaintiff had fallen and injured her lumbar spine requiring three major operations on this portion of her back. At trial and on cross examination defendant sought to examine plaintiff concerning a fall two years earlier in which she had injured her cervical spine -- which also required three operations. Objection was made to this testimony on grounds that the prior fall and injury had nothing to do with the present injury. Plaintiff admitted on direct that she had had a prior fall but denied that she had injuries to her low back at that time. Upon assuring the trial court that he would connect it with the present injury defendant's attorney

was allowed to proceed. The required connection was never made. On appeal defendant maintained that it was entitled to cross examine as to any matter touched on in direct examination and that the evidence was admissible to impeach certain testimony of plaintiff.

The court acknowledged that the purpose of cross examination was to discover the truth but observed that the matters inquired into on cross examination must be relevant to the case on trial. Here there was nothing shown to prove or disprove that there was any connection between the earlier fall and the present injury. Such being the case, the court held that the cross examination relative to the earlier fall constituted reversible error.

The Maryland Court in *Kantor v. Ash*, 215 Md. 285, 137 A.2d 661 (1958) summarized the proposition relied on by Plaintiff in this regard:

"On the ground of disproving the general good health of the appellant prior to the accident and impeaching his credibility, the appellee's counsel cross-examined the appellant about three previous injuries to, and lawsuits by, the appellant, the last occurring in 1953. In these previous accidents, the appellant had received minor injuries from which he had apparently recovered. No expert testimony was offered by the appellee to dispute the affirmative testimony of the appellant's physicians and heart specialists of a causal connection between the accident and the heart condition, nor to show a causal connection between any

"of the previous accidents and the heart condition. Nor was there anything in the records of the previous suits to disclose that the appellant was not in good health before the current accident, that the previous accident had anything to do with the present heart condition, or that he had ever seen a physician for heart trouble, burning sensations in his chest or dizzy spells. However, the trial judge permitted this cross-examination over the objection of the appellant in relation to one of the cases, and 'subject to exception' in the other two. The appellant's counsel did not move to strike the testimony, nor did he later request the court for a ruling upon his objections. He did, however, request the court to instruct the jury that the evidence submitted by the appellee with respect to the several prior accidents had nothing to do with the issue involved in the case being tried of causal connection between the accident of September 11, 1955, and the appellant's subsequent coronary attack.

"We do not think the cross-examination should have been permitted in the first place;"
Id. at 138

Other cases announcing the same rule are: *Knight v. Hasler*, 24 Wisc. 2d 128, 128 NW 2d 407 (1964); *Caley v. Manicke*, 29 Ill.App. 2d 323, 173 N.E.2d 209, rev. on other grounds in 24 Ill. 2d 390, 182 NE2d 206 (1961); *Bingham v. Hillcrest Bowl, Inc.*, 199 Kan. 40, 427 P.2d 591 (1967); *Birmingham Ry. Light and Power Co. v. Selhorst*, 165 Ala. 475, 51 So. 568 (1910).

The above cited cases all establish the proposition that on cross examination one is not permitted to inquire

about matters which have no relevancy to the present action. More particularly, in the case of prior injuries and illnesses, cross examination is not permitted concerning such conditions unless the examining party is prepared to show by competent evidence that the prior injuries have some relation to the present medical conditions. If a party fails to make such a connection the presence of this testimony constitutes reversible error. Here Defense counsel made no assertion to the trial court to the effect that he would connect the 1958 illness mentioned in the Forsyth records to Plaintiff's present medical complaints. As noted before, those records make some reference to the fact that Plaintiff was admitted to the hospital with pain in his back but they make no reference to calcific bridging between the vertebral bodies in the dorsal spine or narrowing of the disc spaces in the dorsal spine such as was found by Dr. Canty. Plaintiff's difficulties in 1958 were obviously not caused by trauma and equally obviously have no relation to his present difficulties.

It is submitted that had the Forsyth records been admitted in the instant case and Drs. Canty and Allard asked a hypothetical question wherein they were to express an opinion on whether or not the episode in 1958 was causing Plaintiff's present complaints, their answer could be no

more definite than was the answer of the doctor in *Pellegrini*. Plaintiff testified that he recovered completely from this virus infection. Later in the same year he was still employed by Safeway Stores doing heavy work. His physical exams by Dr. Danner in 1962 and 1965 indicated he was healthy and normal with no defects or disabilities. He did the heavy work entailed in driving large trucks for seven continuous years prior to the accident with no difficulty. Except for a flareup of his abdominal or ulcer trouble Plaintiff had not consulted a physician for five years prior to the accident. Prior to the time Defendant attempted to introduce the Forsyth records during his examination of Dr. Allard Plaintiff had testified that the specialist in Billings advised him that his difficulties in 1958 were caused by a virus and that he had completely recovered from that condition. Defendant was prepared to offer no evidence to controvert this testimony and Plaintiff's subsequent work and medical history certainly shows nothing which would permit a contrary inference. There was no evidence, nor could there have been any, which would have made a causal connection between the virus infection in 1958 and the dorsal spine injury which Drs. Allard and Canty testified Plaintiff now has.

The District Court was reluctant to permit the Forsyth

records to be used on cross examination absent an assurance from Defendant that it would connect those records to the instant case (no doubt influenced to a large extent by the lapse of time involved) and the testimony which followed proved the correctness of this position. Admission of these irrelevant records would have been clearly erroneous and highly prejudicial to Plaintiff - prejudice which could not have been cured by instructions to the jury. The decision of the District Court sustaining Plaintiff's objection to these records on the grounds of relevancy was correct. When these records were re-offered in Defendant's case in chief they were even more clearly irrelevant and were again properly refused. Exclusion of irrelevant evidence is not error.

III. REJECTION OF THE BILLINGS CLINIC RECORDS WAS PROPER ON GROUNDS THAT THEY WERE IRRELEVANT

During the examination of Dr. Allard, Defendant also offered into evidence certain records from the Billings Clinic, Exhibits F and F-1 (x-rays) -- again for the purpose of attacking the doctor's testimony that Plaintiff's injuries were the result of his fall due to the broken step on Defendant's loading dock. The District Court initially refused the offer of these records after Plaintiff objected that they were not relevant to the present

injuries and that no competent testimony had been offered to connect the contents of these records to the instant case. These records relate to the year 1962 when Plaintiff was referred to the Billings Clinic for evaluation of an abdominal problem. A Dr. Mohs from the Clinic communicated by letter to Dr. Danner indicating his findings and diagnosis. Dr. Mohs suspected a Meckels diverticulum, a disorder of the small intestine. (RT 426) He also found a low back strain with straightening of the spine due to muscle spasm and a questionable disc at L-4, L-5.

Following this initial refusal of Exhibits F and F-1 Dr. William Danner, the physician who referred Plaintiff to Dr. Mohs, was called by Defendant and was permitted without objection to read from Dr. Mohs letter containing the findings and diagnosis outlined above. The entire records were then admitted without objection during Defendant's case in chief. On this appeal Defendant complains that the Court's failure to admit these records, without the supporting testimony of Dr. Danner, denied it the right of cross examination of Drs. Allard and Canty.

Dr. Danner stated clearly that he had referred Mr. Herbert to the Billings Clinic for evaluation of an abdominal problem (which he diagnosed after exploratory

surgery as regional ileitis) not a low back strain. When queried about Dr. Mohs' diagnosis of low back strain and questionable disc Dr. Danner stated that the abdominal problem caused pain which radiated into the back and made diagnosis difficult. (RT 426) He admitted that the diagnosis of disc pathology was never absolute and further admitted that as far as he knew any low back strain went away. The doctor stated Plaintiff did well following the exploratory surgery and was released by him to return to work.

Dr. Danner performed two later physical examinations on Plaintiff to qualify him for truck driving wherein he found no evidence of spine injuries and no disability. He performed a general physical exam on Plaintiff in the Fall of 1965 with normal findings. Neither Dr. Allard nor Dr. Canty, both qualified orthopedic surgeons, found any disc pathology and indeed both doctors indicated that Plaintiff's problem stemmed from an injury to his dorsal spine. Plaintiff continued to work after this incident in 1962, and to do heavy work, until the date of his fall some six years later.

In spite of the foregoing Defendant continues to maintain, as it did at trial, that Plaintiff's present medical

condition is the result of these episodes which occurred six years and more prior to the accident in question. In spite of the fact that the entire records of the Billings Clinic were admitted into evidence and the findings and opinions of Dr. Mohs were read to the jury by Dr. Danner during his examination Defendant maintains that because it was not permitted to cross examine Dr. Allard using these records reversible error has been committed.

As noted in Section I, introduction of these records during Plaintiff's case would have been an objectionable procedure regardless of their admissibility.

Plaintiff did object to the use of the bare records in cross examination since there had been no opportunity at that time for Plaintiff to cross examine Dr. Mohs or any other doctor concerning the opinions and findings contained in these records. The District Court correctly sustained this objection. When Dr. Danner was on the stand, and Plaintiff could demonstrate that these 1962 findings were not connected to the injury sustained by Plaintiff in 1968, it withdrew its objection. Plaintiff made no objection when Dr. Danner read the findings and diagnosis to the jury and did not object when these records were offered in Defendant's case in chief as they had been explained by a medical witness and their "non-connection" to the Plain-

tiff's present injury shown.

Much of the discussion in Part II of this Brief is applicable to the Billings Clinic Records as well as the Forsyth Records. Defendant was under an obligation, before it could properly admit such records into evidence, to demonstrate that the conditions to which these records related were causally connected to the instant case. If no such connection could be shown the records were irrelevant and their use would constitute reversible and prejudicial error. Defendant failed to make any such connection -- and in fact no such connection was ever attempted.

Defendant never asked Dr. Danner whether he thought the "low back strain" found by Dr. Mohs contributed to Mr. Herbert's present medical condition. When Plaintiff asked this question on cross examination the doctor indicated that so far as he knew it didn't. (RT 427) Defendant claims he could not have examined Dr. Allard on the question of whether or not Dr. Mohs' findings and diagnosis would qualify Dr. Allard's testimony on causation. As a matter of fact following the admission of Dr. Mohs' findings and diagnosis the record indicates that Dr. Allard was still available to testify:

"THE COURT: Thank you, Doctor Allard, you may step down.

Is there any reason for keeping Dr. Allard here?

MR. SYMMES: He is in town. I presume he is going to remain in town, aren't you?

THE WITNESS: Yes, sir.

MR. SYMMES: We can hold him, subject to a phone call in the event we want to recall him.

THE COURT: Would you be available under those circumstances?

THE WITNESS: Yes.

(Witness excused)" (RT 373-374)

No reason is advanced by Defendant explaining why he could not have recalled Dr. Allard and examined him concerning these matters if it had chosen to do so.

There is an additional fact which demonstrates that this 1962 episode had nothing to do with the instant case and why the Billings Clinic Records, and the findings of Dr. Mohs contained therein, have no relation at all to Plaintiff's present injuries. Defendant wanted to relate the straightening of the lordotic curvature and questionable disc mentioned in the Billings Clinic Records to Plaintiff's present complaints. First of all, neither of the orthopedic surgeons who testified at trial -- includ-

ing Defendant's doctor -- found any evidence of disc pathology at L-4, L-5. In the face of this the "questionable disc" problem fades out of the picture. Secondly, Dr. Allard testified that when Mr. Herbert was first admitted to Deaconess Hospital on March 11, 1968, following the accident the x-rays of his back showed a negative lumbar spine:

"A. Yes, sir. It is negative lumbar spine.

Q. That means negative as far as any alignment, doesn't it?

A. Negative as far as any changes.

Q. He had a perfectly normal lumbar spine so far as the x-ray that was taken when he was first brought to Deaconess Hospital?

A. Yes, sir."

(RT350) (Emphasis supplied)

This clearly shows that the x-ray findings of Dr. Mohs of six years earlier were definitely not present when Plaintiff entered the Billings Hospital following the accident. (RT 371-372) A fair inference from this is that his present complaints have developed since that time and did not pre-date it. Defendant's own counsel asked Dr. Allard whether or not the loss of lordotic curvature could have pre-dated the accident. Dr. Allard at first replied that he could not be sure -- then recalled the normal x-rays referred to above and indicated that this condition did

not pre-date the Plaintiff's fall. (RT 371)

Mobil Oil argues that had Drs. Allard and Canty known of the Billings Clinic Records they would surely have changed their opinion vis a vis causation of Plaintiff's injuries. The discussion in the record between Defendant's counsel and Dr. Allard clearly indicates that this is not true as to Dr. Allard because of the fact that Plaintiff's x-rays following the accident at first showed a normal spine. There is no reason to believe that Dr. Canty would have taken a different position. If Defendant really believed that the contents of these records would have changed the testimony of Drs. Allard and Canty he could have recalled them and brought it to their attention which, as pointed out in Section I, would have been the normal procedure in any event. Dr. Allard's availability for further testimony was requested by Defendant and is shown by the record -- Dr. Canty was the Defendant's own doctor and similar arrangements could have been made with him.

As pointed out above, Plaintiff's position with regard to the Billings Clinic Records was that they were irrelevant to the issues in this case -- although it had no objection to their introduction through medical testimony so that their contents could be explained to the

jury. As with the Forsyth Records they were correctly refused in the first instance as being irrelevant, absent an assurance by Defense counsel that he would connect them to the present injuries and because they exceeded the scope of direct examination. But aside from this, the later introduction of these records gave Defendant a chance to recall the doctors for further examination if he desired. The content of the records was in evidence and Defendant argued its impact to the jury. If there were any error in their initial refusal it was rendered harmless by their subsequent introduction into evidence. The irrelevance of these records to Plaintiff's present injury has been demonstrated, no prejudice to Defendant's case is shown, and the District Court's refusal to admit them during the cross examination -- even if erroneous -- would constitute harmless, not reversible, error. *Dale v. Hill*, 219 F.2d 480 (9 Cir. 1954); *Baer Bros. Land and Cattle Co. v. Reed*, 197 F.2d 567 (10 Cir. 1948).

IV. APPELLANT'S HEAVY RELIANCE ON THE UNIFORM
BUSINESS RECORDS AS EVIDENCE ACT TO JUSTIFY
ADMISSION OF THE HOSPITAL AND CLINIC RECORDS
BEGS THE REAL QUESTIONS PRESENTED ON THIS
APPEAL

In its Brief Mobil Oil repeatedly cites the so-called Federal Shop Book Act, 28 U.S.C.A. §1732 as supporting

the admission of the hospital and clinic records which are the subject of this appeal. This reliance is misplaced and really begs the principle questions presented here i.e., did the records contain anything which was relevant to the issues of the instant case and were the records offered in a proper fashion. More particularly, did the ailments from which Plaintiff was suffering at the times those records were made have anything to do with the back injury which Plaintiff now has? If the answer to this question is no then it makes no difference whether or not the records were excluded -- the exclusion of irrelevant evidence is not error. *Dale v. Hill*, supra. The Shop Book Act deals with competency and provides an exception to the hearsay rule -- it has nothing to do with relevancy.

Plaintiff acknowledges that many courts have held hospital records admissible under the Shop Book Act and that this Court has so held in *Medina v. Erickson*, 226 F.2d 475 (9 Cir. 1955). The fact that such records may be admissible in a proper case is not disputed -- but Defendant cites no case where it is held that hospital records which are not relevant are admissible merely because they meet the tests necessary to be admitted under 28 U.S.C.A. §1732.

In this connection it should be noted that Defendant was not prepared to lay the foundation necessary for admitting either the Forsyth or the Billings Clinic Records. In order to qualify for admittance under the Shop Book Act it must be shown that the records were prepared in the regular course of business and at or near the time when the observations were made. *Medina*, supra at 482. *Bisno v. U.S.*, 299 F.2d 711, cert. den. 370 U.S. 952 (9 Cir. 1961) At the time Defendant first offered these records during Plaintiff's case it was in no position to lay the necessary groundwork for their admission, either as to foundation or as to relevancy. Since Plaintiff's objection went primarily to relevancy and not to competency, trial counsel waived any "foundation" requirements. Foundation is placed in quotation marks since, as the trial court noted in its opinion denying Defendant's motion for a new trial, this waiver of foundation was understood by the District Court to extend to the matter of identification of the records as being from a particular institution, not to a waiver of all foundation requirements. (CR 424) But for this "waiver" by Plaintiff's counsel at trial, Defendant's argument concerning the Shop Book Act, which it did not advance to

the trial court, would not be possible here. The record is clear that Defendant was never in a position to lay the foundation necessary for the admission of these records under 28 U.S.C.A. §1732.

CONCLUSION

When Defendant first offered the Forsyth and Billings Clinic Records they were objectionable both on the grounds of relevancy to any issue in the instant case and on grounds that they exceeded the scope of the direct examination. Their exclusion at that time by the District Court would have been proper on either of these grounds. Any error in the refusal of the Billings Clinic Records was harmless since these records were admitted into evidence during Defendant's case and their irrelevancy demonstrated. Had Defendant wished to examine Drs. Allard and Canty concerning these records it could have done so. The rejection of the Forsyth Records when they were offered in Defendant's case was proper since they were then even more clearly irrelevant.

For the foregoing reasons, it is respectfully submitted that the Verdict and Judgment below should be

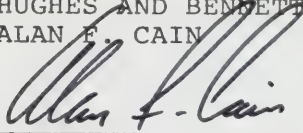
affirmed.

Respectfully submitted this 18th day of January,
1972.

ROLAND V. COLGROVE

HUGHES AND BENNETT
ALAN F. CAIN

By

A handwritten signature in dark ink, appearing to read "Alan F. Cain", is written over a horizontal line. The signature is stylized with large, sweeping loops.

CERTIFICATE OF SERVICE BY MAIL

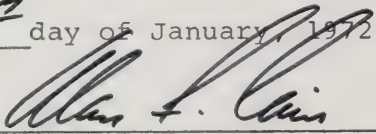
I, ALAN F. CAIN, one of the attorneys for the Appellee in the above entitled action, DO HEREBY CERTIFY that on the 18th day of January, 1972, I served the foregoing BRIEF OF APPELLEE upon:

Shughart, Thomson & Kilroy
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the attorneys for Appellant in said action by depositing a true copy thereof in the United States Mails at Helena, Montana on said date, securely enclosed in a sealed envelope with first class postage prepaid thereon addressed to them as above set forth, these being the last known addresses of said attorneys.

DATED this 18th day of January, 1972.



Alan F. Cain

No. 71-2601

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF PHOTOGRAPHERS, a
California Corporation,

Plaintiff Appellant,

vs.

FARBENFABRIKEN BAYER AG, a corporation; AGFA AG,
a corporation; AGFA-GEVAERT AG, a corporation;
BAYER FOREIGN INVESTMENTS, LTD., a corporation;
AGFA INCORPORATED, a corporation; AGFA-GEVAERT,
INC., a corporation; NAFTONE, INC., a corporation;
and EDWARD MAXIMILLIAN PFLUEGER, an individual,

Defendants-Appellees.

Brief of Appellees

Naftone and Agfa-Gevaert, Inc.

RYAN AND TRAXLER,

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Inc. and Agfa-Gevaert, Inc.

FILED

FEB 23 1972

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AGFA INCORPORATED, a corporation; AGFA-GEVAERT,
INC., a corporation; NAFTONE, INC., a corporation;
and EDWARD MAXIMILLIAN PFLUEGER, an individual,

Defendants-Appellees.

Brief of Appellees Naftone and Agfa-Gevaert, Inc.

Introduction.

This is an antitrust action in which plaintiff (IAP) claims treble damages in the amount of \$3,450,000, plus costs and attorney's fees, for alleged violations of the Sherman and Clayton Acts. There were eight named defendants—four foreign corporations (Farbenfabriken Bayer AG, Agfa AG, Agfa-Gevaert AG and Bayer Foreign Investments, Ltd.), three domestic corporations (Agfa Incorporated, Agfa-Gevaert, Inc. and Naftone, Inc.) and an individual (Edward Maximillian

Pflueger). Only six of the defendants were served with process (the four foreign firms, Agfa-Gevaert, Inc. and Naftone, Inc.). No attempt has ever been made to serve Agfa Incorporated or Pflueger.

On June 9, 1971, the District Court entered an order of dismissal against the four foreign corporations for lack of personal jurisdiction. Thereafter, on July 21, 1971, the District Court dismissed the action as against Naftone and Agfa-Gevaert, Inc. for failure to prosecute, and in a further order entered on July 22, 1971, it dismissed the action "as to all remaining defendants" (Agfa Incorporated and Pflueger) [R. 258].*

Prior Proceedings.

The present complaint was filed on June 24, 1969—over two and one-half years ago [R. 1].

An earlier complaint, identical in every respect to the present one, had been filed in the District Court on March 1, 1967 [R. 69]. Only one of the eight named defendants was served in the prior action, and, when no steps were taken by IAP to advance its case, that action was dismissed for want of prosecution by order dated February 12, 1969, pursuant to a local rule of the District Court. [R. 70].

Some four months later the present complaint was filed (actually refiled), but IAP has literally done nothing in the intervening years to advance the litigation. For example, even IAP's attempts at service of the

*The caption of the July 22 order which names only four defendants makes it perfectly plain that the District Court, having dismissed the action as against the foreign firms on June 9 and as against Naftone and Agfa-Gevaert, Inc. on July 21, was entering an additional order for purposes of recording its dismissal of the action as against Agfa, Incorporated and Pflueger (the only defendants then remaining in the action).

second complaint have been characterized by undue delay. Although two defendants (Agfa-Gevaert, Inc. and Naftone), which are United States corporations, conduct business in the Central District of California and were readily available for service,* they were not served until October 28, 1969, and November 7, 1969, respectively—over four months after the filing of the second complaint. Moreover, IAP did not accomplish service on the four foreign defendants until eighteen months after the second complaint had been filed, although the procedure by which service was ultimately effectuated (service upon the Secretary of State pursuant to Section 6501 of the California Corporations Code) had been available to IAP throughout the period during which the action was pending. And with respect to Agfa-Gevaert, Inc. and Naftone, which it did get around to serving, it has undertaken none of the traditional discovery procedures such as propounding interrogatories, noticing depositions or seeking the production of documents. And although Naftone and Agfa-Gevaert, Inc. propounded interrogatories and served a Rule 34 request, IAP has done nothing at all by way of affirmative response.

On March 3, 1971, all defendants who had been served responded to the second complaint. Naftone and Agfa-Gevaert, Inc. filed answers [R. 99 and 104], and the four foreign corporate defendants (Farbenfabriken Bayer AG, Agfa AG, Agfa-Gevaert AG and Bayer Foreign Investments, Ltd.) filed a motion to quash and dismiss pursuant to Rule 12(b) [R. 109]. On June 9, 1971, the District Court entered an order granting that motion [R. 223].

*Agfa Incorporated was also available for service in the Central District, but IAP never attempted to accomplish that service.

On July 12, 1971, IAP filed a notice of appeal from the order of June 9, 1971 [R. 247]. On September 29, 1971, the four foreign defendants moved before this Court for an order dismissing that notice of appeal on the ground that it had not been filed within the 30-day period required by Rule 4(a) of the Federal Rules of Appellate Procedure and Section 2107 of the Judicial Code (28 U.S.C.A.). On October 21, 1971, this Court granted that motion and dismissed the appeal, noting that IAP had failed to respond.*

Meanwhile, on June 10, 1971, the District Court had entered an order to show cause why the second IAP complaint should not be dismissed for failure to prosecute as against Naftone and Agfa-Gevaert, Inc. (the only defendants that had answered) [R. 227], and on July 21, 1971, the District Court entered such an order of dismissal pursuant to Rule 41(b) [R. 256]. IAP has not appealed from that order. On July 22, 1971, a further order was entered dismissing the second complaint "as to all remaining defendants" (Agfa Incorporated and Pflueger) [R. 258]. On August 13, 1971, IAP filed a notice of appeal from that order [R. 259].

The present IAP appeal, then, involves only the order of July 22, 1971, which dismissed the second complaint as against the unserved defendants Agfa Incorporated and Pflueger. Accordingly, the only issue properly before this Court is whether the District Court was correct in dismissing the second complaint as

*All documentation of the dismissal will be found under File No. 71-2515 of this Court.

against those unserved defendants (or, perhaps, as against Naftone and Agfa-Gevaert, Inc. for failure to prosecute). In that regard we believe that, where a case comes before this Court on appeal from an order dismissing the complaint for failure to prosecute, review should be confined to the propriety of the action of the District Court in dismissing the case for failure to prosecute. Nonetheless, we meet below the issue whether the District Court abused its discretion in making its three orders of June 9, July 21 and 22, 1971, dismissing the action as against all defendants, both served and unserved.*

*Counsel for appellees appeared for all served defendants in the District Court.

ARGUMENT.

POINT I.

IAP Has Failed to Show That the District Court Abused Its Discretion in Dismissing the Second Complaint for Failure to Prosecute.

Although IAP filed its initial antitrust complaint more than four years ago and, after that action had been dismissed for failure to prosecute, refiled an identical complaint more than two years ago, it did absolutely nothing to prosecute its claim. IAP has attempted no discovery at all, has not answered interrogatories and a Rule 34 request made by Naftone and Agfa-Gevaert, Inc. and has even failed to respond to the motion to dismiss its prior appeal with respect to the foreign defendants.

The District Court has the “inherent power” to dismiss this action for lack of prosecution. That principle is clearly enunciated in the decisions cited by the District Court in its order to show cause [R. 227], particularly in the decision of the Supreme Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). More recently, this Court’s opinion in *States Steamship Co. v. Philippine Air Lines*, 426 F.2d 803, 804 (9th Cir. 1970), explained:

“That a Court has power to dismiss an action for want of prosecution on its own motion, both under Rule 41(b) F.R. Civ. P., or under its local rule, or even in the absence of such rules, is settled in this circuit.”

See also, Sheaffer v. Warehouse Employees Union, Local No. 730, 408 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969); 5 Moore, *Federal Practice* ¶41.11 [2] at 1115 (1969).

The power of the District Court to dismiss is discretionary and will be reversed on appeal only upon a showing of abuse. *Alexander v. Pacific Maritime Association*, 424 F.2d 281 (9th Cir. 1970); *Ballew v. Southern Pacific Co.*, 428 F.2d 787 (9th Cir. 1970); *States Steamship Co. v. Philippine Air Lines*, *supra*; *Redac Project 6426, Inc. v. Allstate Insurance Co.*, 412 F.2d 1043, 1046 (2d Cir. 1969). While there may be no "fixed guidelines" for a determination of whether conduct has been so dilatory as to mandate a dismissal for lack of prosecution, this Court has recently and clearly enunciated the standard of review that it will apply. See *Alexander v. Pacific Maritime Association*, *supra*, at 283:

"The exercise of the power to dismiss is discretionary and will be reversed only for an abuse of that discretion. *Fitzsimmons v. Gilpin*, 368 F.2d 561 (9th Cir. 1966). Unreasonable delay creates a presumption of injury to appellees' defenses. *Pearson v. Dennison*, *supra*, 353 F.2d p. 28.

"Although each case must depend upon its own facts, a good rule of thumb to be followed is that the exercise of discretion by the trial judge should not be disturbed unless there is 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' *States Steamship Co. v. Philippine Air Lines Co.*, *supra*, 426 F.2d p. 804."

The authorities, when considered in light of the present record, confirm that the dismissal of the second IAP complaint was a proper exercise of discretion and not a "clear error of judgment".

In *Ballew v. Southern Pacific Co.*, *supra*, a dismissal for lack of prosecution was sustained where the plaintiffs took no steps to advance their case for a period of eighteen months, while in *States Steamship Co. v. Philippine Air Lines*, *supra*, the inactivity between the time the action was commenced and the Court's order to show cause why the action should not be dismissed lasted for sixteen months. The dismissal in the latter case was sustained although plaintiff initiated discovery proceedings and responded to a defendant's interrogatories between the time of the Court's order and the hearing thereon. In *West v. Gilbert*, 361 F.2d 314 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966), a dismissal was affirmed when it was ordered without notice pursuant to a prior order which required the plaintiffs to "file a note of issue or take other action to obtain a determination . . ." within approximately sixty days (*id.* at 316). The action had been pending approximately two and one-half years when the "sixty day order" was issued, and despite the fact that "substantial discovery took place, including 1,000 pages of deposition and hundreds of documents marked for identification" (*id.* at 315-16), the dismissal was held to be a proper exercise of discretion.

In a private antitrust action entitled *Food Basket, Inc. v. Albertson's Inc.*, 416 F.2d 937 (10th Cir. 1969), a dismissal for failure to prosecute pursuant to Rule 41(b) was affirmed when the plaintiff took no steps to prosecute its claim over a period of less than seven months. In *Food Basket*, the 10th Circuit had affirmed a District Court decision granting summary judgment on certain of plaintiff's claims. However, it had vacated the District Court judgment in favor of defendant with respect to plaintiff's Sherman Act claim

and had remanded the case in order to permit plaintiff to amend its pleadings with respect to the Sherman Act averments. The plaintiff, however, neither filed, nor sought leave to file, any amendments with respect to the Sherman Act claim, nor did it in any other way take any action to prosecute its case from the time the mandate of the Court of Appeals had been filed until the District Court called the case on its calendar approximately seven months later. The Court of Appeals concluded that dismissal of the action seven months after the mandate had been filed and almost one year subsequent to the filing of the opinion on appeal was not an abuse of discretion and affirmed the dismissal.

In *Russell v. Cunningham*, 233 F.2d 806 (9th Cir. 1956), a case which had been at issue for fifteen months was dismissed for lack of prosecution although considerable pre-trial discovery had been conducted. This Court ruled that the District Court had not abused its discretion in dismissing the action when it had been pending for fifteen months, during which time the plaintiff had done little or nothing to bring it to trial and explained that "defendants should not be kept with lawsuits hanging over their heads for long periods of time. . . ." (*id.* at 810).

An interesting fact situation was presented to the Eighth Circuit in *Grunewald v. Missouri Pacific R.R. Co.*, 331 F.2d 983 (8th Cir. 1964), an appeal from a dismissal for want of prosecution where the case had been at issue only seventeen months. The complaint had been filed in February 1962 and the case set for trial the following September. Some discovery was conducted in June 1962, and the following month, the defendant, over plaintiff's opposition, obtained a new trial date in December 1962. The case was reset on two

further occasions—once by agreement and the second time by the Court on its own motion. Plaintiff had been able to obtain a further resetting of the case for September 4, 1963, with the consent of defendant. On August 31, four days prior to the new trial date, plaintiff's attorney advised the Court that he was withdrawing from the case, and on September 3, another attorney informed the Court that he had been retained by plaintiff and requested a continuance. Despite the appellant's insistence that not one of the four earlier continuances had been at her request alone, that she had been left without representation on the eve of trial and the fact that the case had been pending only seventeen months, the Circuit Court, in an opinion by Judge (now Mr. Justice) Blackmun, concluded that the refusal by the District Court to grant plaintiff a further continuance and its dismissal of the action with prejudice was not an abuse of discretion.

The instant case shows a lack of diligence of a far more serious degree than that which gave rise to dismissal in any of the above discussed cases. In each of the above cases except *West v. Gilbert, supra*, the period of inactivity was less than the two and one-half years during which IAP remained inactive since the second filing of its complaint. And in the *West* case, a substantial amount of discovery had been completed. Here the controversy had actually been presented to the District Court for resolution more than four years ago, when the identical complaint was filed in March of 1967. Absolutely no steps were taken by IAP to pur-

sue its cause of action, and, after the District Court had granted IAP additional time to prosecute its claim [R. 83; *see also* R. 38], the case was finally dismissed on February 12, 1969, for lack of prosecution. Four months later, IAP again presented its claims to the District Court, and when, after fifteen more months, the only affirmative step taken by IAP was belatedly to serve two defendants, the Court once more moved *sua sponte* for dismissal [R. 38]. IAP successfully avoided dismissal on that occasion by ultimately effecting service, but it then lapsed into inactivity as to the served defendants and took no steps to bring this controversy to a conclusion. It did not propound interrogatories or notice depositions or seek the production of documents. Moreover, it has failed to respond to the interrogatories propounded by Naftone and Agfa-Gevaert, Inc. and to respond to their Rule 34 requests.

Clearly, then, entry by the District Court of the dismissal orders on July 21 and 22, 1971, was neither a "clear error of judgment" nor an abuse of its discretion. As stated in *Janousek v. Wells*, 303 F.2d 118, 122 (8th Cir. 1962):

"The courts are always open to all persons in order that disputes and controversies may be litigated and resolved in accordance with clearly defined rules of procedure and the law. One of these rules requires the plaintiff to prosecute his cause of action with reasonable diligence, and if he flouts this rule he stands to suffer the penalty of dismissal."

Here IAP clearly has failed diligently to pursue its claim and must of necessity “suffer the penalty of dismissal”. Significantly, IAP has not been unwarned of this possible consequence of its inactivity as its 1967 complaint was dismissed for want of prosecution and the present complaint was subject to a similar order to show cause for dismissal initiated by the Court on September 8, 1970 [R. 38]. While the Court did not at that time dismiss for want of prosecution [R. 83], its initiative clearly put IAP again on notice that dismissal for want of prosecution would be the inevitable result of its continued (and consistent) failure diligently to pursue its claim.

POINT II.

The District Court Did Not Err in Dismissing the Action as to Four Foreign Defendants on Jurisdictional Grounds.

This Court has already dismissed the IAP appeal from the dismissal of the action on jurisdictional grounds as against defendants Farbenfabriken Bayer AG Agfa AG, Agfa-Gevaert AG and Bayer Foreign Investments, Ltd.* To the extent that this Court may wish to reconsider that question, we invite attention to the decision and order of the District Court [R. 223 *et seq.*] and to the memorandum and reply memorandum of law submitted in support of the motion to dismiss made on behalf of the foreign defendants [R. 112 *et*

*As noted above, all documentation of the dismissal will be found under File No. 71-2515. No petition for rehearing was filed by IAP, and the judgment of this Court was “filed and spread” on December 9, 1971.

seq. and 211 *et seq.* | for a full discussion of the issues and authorities supporting the propriety of the District Court dismissal.

Conclusion.

This Court should affirm the dismissal of the complaint for lack of prosecution.

February 22, 1972.

Respectfully submitted,

RYAN AND TRAXLER,

By SIDNEY TRAXLER,

*Attorneys for Appellees Naftone, Inc.
and Agfa-Gevaert, Inc.*

No. 71-2601

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF PHOTOGRAPHERS, a
California Corporation, *Plaintiff-Appellant,*

vs.

FARBENFABRIKEN BAYER, A.G., a corporation; AGFA,
A.G., a corporation; AGFA-GEVAERT A.G., a corpo-
ration; BAYER FOREIGN INVESTMENTS LTD., a corpo-
ration; AGFA INCORPORATED, a corporation; AGFA-
GEVAERT, INC., a corporation; NAFTONE, INC., a
corporation; and EDWARD MAXIMILLIAN PFLUEGER,
an individual, *Defendants-Appellees.*

APPELLANT'S OPENING BRIEF.

FILED

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JAN 24 1972

WM. B. LUCK, CLERK

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No. 71-2601

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GEVAERT, INC., a corporation; NAFTONE, INC., a
corporation; and EDWARD MAXIMILLIAN PFLUEGER,
an individual, *Defendants-Appellees.*

APPELLANT'S OPENING BRIEF.

History of the Case.

The original complaint for Treble Damages for Violation of Anti-Trust Laws was filed on June 24, 1969 in the Central District of California. On October 20, 1969 the United States Marshal served the Summons and Complaint on defendant Agfa-Gevaert. On November 7 1969 the United States Marshal served the Summons and Complaint on defendant Naftone, Inc. On November 29, 1969 plaintiff filed an application pursuant to Rule 4 Subsection (i) and D of the Rules of Federal Procedure. On November 20, 1969 United States District Judge Warren Ferguson denied the application. On April 14, 1970 plaintiff made an application for Order for service on the foreign defendants. Judge

Ferguson denied this application on grounds that there was no affidavit accompanying the application. On September 8, 1970 the court issued an Order to Show Cause why the case should not be dismissed for failure to prosecute the action. On October 5, 1970 a Stipulation was filed between Thomas Lea Garry and Sidney Traxler, attorneys for Naftone and Agfa Gevaert, Inc. that said defendants be not required to plead until 45 days after service of process had been effected on the German defendants. An order approving the stipulation was denied. On October 5, 1970 Thomas Lea Garry submitted his affidavit regard the court's order to show cause and the matter was submitted. On October 5, 1970 Thomas Lea Garry submitted an affidavit for order for service of summons and complaint on all foreign corporations by delivery to the Secretary of State. At the same time plaintiff filed a brief in regard acquiring jurisdiction on alien foreign corporations. On October 5, 1970 Judge Warren Ferguson signed the order for service of summons and complaint on the foreign defendants by delivery to the Secretary of State of California.

On October 8, 1970 Naftone filed a Notice of Motion of defendants Naftone and Agfa Gevaert, Inc. to dismiss under Rule 41b. On October 12, 1970 the corrected notice of motion was filed in regard to motion to dismiss. On October 26, 1970 the court dismissed the defendants' motion and further ordered that the defendants were served.

On October 9, 1970 the alias summons and complaints for the foreign defendants were delivered to S. Oscar Johnson, Deputy Secretary of State by the United States Marshal for delivery to the foreign defendants. On December 24, 1970 the foreign defendants

were granted an extension to plead by stipulation and order until February 1, 1971. A further extension to March 2, 1971 was ordered. On March 2, 1971 Naftone and Agfa-Gevaert, Inc. filed their answer to plaintiff's complaint. On the same day defendants Farbenfabriken Bayer AG, Agfa Ag, Agfa-Gevaert AG and Bayer Foreign Investments Limited filed a motion to quash service together with affidavits and points and authorities.

Plaintiff's opposition to the motion consisted solely of a memorandum of law and argument requesting the court to withhold a decision until discovery had been completed by plaintiff. On June 9, 1971 Judge Warren Ferguson signed an order granting the motion to dismiss by the four foreign defendants. In the order the court stated that the foreign defendants should not be subjected to discovery in order to establish personal jurisdiction. On June 10, 1971 the court filed an order to show cause why complaint should not be dismissed for failure to prosecute. On July 21, 1971 the court entered its order dismissing action against Naftone, Inc. and Agfa Gervaert, Inc. On July 22, 1971 the court filed its order dismissing the action as to all remaining defendants. On August 19, 1971 plaintiffs filed Notice of Appeal.

Summary of Argument.

POINT I.

The trial court erred in quashing the service on the foreign defendants Farbenfabriken Bayer, A.G., Agfa AG, Agfa-Gevaert AG and Bayer Foreign Investments Ltd.

POINT II.

The court erred in dismissing as to all defendants for lack of prosecution.

ARGUMENT.

POINT I.

The Issue as to Point I of Plaintiff's Argument, Is Whether the Court Abused Its Discretion in Dismissing the Complaint as to the Four Foreign Defendants Without Allowing the Plaintiff to Proceed With Discovery.

The plaintiff had heretofore filed an appeal as to the dismissal of the foreign defendants which was not timely filed and said appeal was dismissed. However, in view of the fact that dismissal of the four defendants did not constitute a complete disposition of the case said appeal was premature and this is made clear in the case of *Steiner v. 20th Century Film Corporation*, 220 F.2d 105, which case held that in an anti-trust action against several defendants where there was but one claim for relief, dismissal of the complaint as to all but one of the defendants was not a final appealable order. Clearly in this case there was no final appealable order until the court dismissed all of the parties. The Federal courts have tended to recognize discovery as an appropriate means of ascertaining facts relevant to jurisdiction. *Peoples Tobacco Company v. American Tobacco Company*, 246 U.S. 79.

The trial court in quashing the service on the foreign defendants stated in its order on page 225, volume 2, line 10 of its transcript

“Furthermore, this court ought not to continue the action against the defendants, and allow them to be subjected to discovery in that capacity, where the court has un rebutted evidence before it that the defendants are not subject to its personal jurisdiction. See *Occidental Petroleum Corporation v. Buttes Gas & Oil Co.*, 187 Trade Cases 73,525 (C.D. Cal. March 17, 1971).”

At the time of the motion to quash service the plaintiff, without discovery, had no way of making an affidavit to contradict the self serving affidavits of the foreign defendants. Even their affidavits left innuendos that revenues were being derived from their so-called independent subsidiaries in this judicial district. In the case of *River Plate Corporation v. Forester Land, Timber and Railway Company*, 185 Fed. Supp. 832, the court laid down what would appear to be a reasonable rule when they state that the fact that there may have been prior activities sufficient to constitute presence in the jurisdiction, is at least an indication that a motion to dismiss for lack of jurisdiction should not be determined by affidavits alone but that plaintiff should be afforded an opportunity to explore the question of whether such activities have in fact continued and whether the service is valid.

It should be held error under such circumstances to grant a motion to dismiss for want of jurisdiction without affording plaintiff an opportunity to explore the facts. The court, in the cited case, held that a motion to dismiss for lack of *in personam* jurisdiction should be held in abeyance pending the taking of depositions by plaintiff in an attempt to elicit facts to sustain jurisdiction.

The plaintiff feels that the court abused this discretion in dismissing for lack of jurisdiction until plaintiff could complete discovery proceedings.

POINT II.

The Court in Dismissing the Complaint as to the Four Foreign Defendants on Grounds of Lack of Jurisdiction Rendered It Impossible for the Plaintiff to Proceed Against the Remaining Defendants Since the Essence of the Anti-Trust Action Was the Conspiracy Between All of the Co-Defendants, Foreign and Domestic.

By not allowing discovery to establish jurisdiction as to the foreign defendants and the master conspirators the court tied the hands of the plaintiff to proceed.

At the time of the ruling wherein, the foreign defendants were dismissed, plaintiff was about to submit interrogatories and request for admissions to lay a basis for future depositions. The court's ruling eliminated any chance of proceeding along these lines. The trend in both federal and state cases has been to expand the court's jurisdiction to reach foreign defendants and plaintiff feels that the narrow view taken by the trial court is not in line with current direction of the law to protect domestic business from foreign monopoly practices. Plaintiff's failure to prosecute the action can be laid directly to the action of the trial court in holding that discovery should not be used to establish jurisdiction. This holding is patently prejudicial to any plaintiff seeking jurisdiction over a foreign defendant. The trial court's decision was tantamount to tying a man's hands and feet and then asking them why he can't walk.

The case should be remanded with directions to the trial court to allow discovery on the issue of jurisdiction before a final ruling is made as to jurisdiction.

Respectfully submitted

THOMAS LEA GARRY,
Attorney for Appellant.

MAR 1972

See file 3151

FILED

MAR 3 1972

WM. B. LUCK, CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID HENRY LLOYD,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

71 2680

No. ~~71-6100~~

On Appeal from Judgment of
The United States District Court
For the District of Arizona

BRIEF OF APPELLEE

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID HENRY LLOYD,)	
)	
Appellant,)	
)	
vs.)	No. 71-6100
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	

On Appeal from Judgment of
The United States District Court
For the District of Arizona

BRIEF OF APPELLEE

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I

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III

ISSUE PRESENTED

WHETHER THE FILING OF A CONSCIENTIOUS OBJECTOR CLAIM SUBSEQUENT TO AN ORDER TO REPORT FOR INDUCTION AND PRIOR TO THE REPORTING DATE REQUIRES THE LOCAL BOARD TO REOPEN AND RECONSIDER A REGISTRANT'S CLASSIFICATION.

IV

STATEMENT OF THE CASE

A. Jurisdictional Statement.

On January 20, 1971, a Federal Grand Jury for the District of Arizona at Phoenix, returned an indictment charging David Henry Lloyd (hereinafter, defendant) with a violation of Title 50, United States Code, Appendix, Section 462, Failure to Comply with an Order of his Local Board to Submit to Induction into the Armed Forces of the United States (Volume I, Record on Appeal, Page 1; hereinafter, I, RA, 1).

On February 16, 1971, the defendant was released on his unsecured personal surety bond in the amount of one thousand dollars (\$1,000.00) (I, RA, 5). On March 8, 1971, the defendant appeared with counsel in United States District Court for the District of Arizona at Phoenix

and entered a plea of not guilty to the charge contained in the indictment.

On June 24, 1971, the defendant, counsel for the defendant, counsel for the government, and the Court executed a Waiver of Trial by Jury and Waiver of Special Findings of Fact pursuant to Rule 23(a) and 23(c), Fed. R. Crim. P. (I, RA, 10). The matter proceeded to trial and the Court returned a verdict of guilty as charged in the indictment (I, RA, 14).

On August 9, 1971, the Court entered judgment against the defendant upon its finding of guilt and committed the defendant to the custody of the Attorney General for treatment and supervision until discharged by the Youth Corrections Division of the Board of Parole in accordance with the provisions of Title 18, United States Code, Sections 5010(b) and 5017(c) (I, RA, 8). The execution of the sentence was ordered stayed pending appeal and the defendant was continued on his existing bond (I, RA, 8).

On August 13, 1971, the defendant filed his Notice of Appeal (I, RA, 9) and the parties filed their stipulation regarding the Designation of Record on Appeal on August 24, 1971 (I, RA, 13).

On September 17, 1971, this Court set a ready date in this appeal of December 21, 1971. On September 27, 1971, and October 27, 1971, counsel for the defendant was advised by this Court that Appellant's Brief was due to be filed by November 10, 1971.

On November 12, 1971, defendant filed his Motion for Leave to Extend Time for Filing of Appellant's Opening Brief and this Court extended the time for filing until November 29, 1971. On December 10, 1971, this Court advised the defendant that his brief was overdue and dismissal of the appeal would be considered on or after December 20, 1971 for failure to prosecute.

On December 21, 1971, this Court advised the defendant that his brief was due to be filed on November 29, 1971, and was late. On January 18, 1972, this Court advised the defendant that it had received no response to its letter of December 21, 1971, and dismissal of the appeal would be considered on or after January 25, 1972, for failure to prosecute.

On or about December 20, 1971, defendant's brief was transmitted by mail to this Court and on February 7, 1972, pursuant to an order of this Court, Appellant's

Brief was accepted by the Clerk of this Court and filed.

The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

B. Statement of Facts.

The defendant's Selective Service file (Government's Exhibit 1) evidences the following relevant facts:

1. On February 6, 1968, the defendant was sent a delinquency warning for failure to complete and return his Classification Questionnaire (SSS Form 100). An examination of Form 100 reveals that in addition to containing information used in connection with classifying a registrant, the rear portion of the form is used to record or summarize entries in the defendant's file. In this instance, since the Board did not have a Form 100, a Form 99 (Minutes of Action, Continuation Sheet) was used for that purpose.

2. On March 15, 1968, the defendant requested a duplicate Notice of Classification (SSS Form 110).

3. On June 10, 1968, the defendant was classified I-A and, on June 21, 1968, was sent a Notice of Classification (SSS Form 110) and advised of his rights to appeal that classification within thirty days (July 21,

1968). On September 18, 1968, the defendant advised the Local Board of a change in his address and requested a student deferment.

4. On July 29, 1969, subsequent to his physical examination, the defendant was found acceptable for induction and notified of that finding on September 17, 1969.

5. On March 18, 1970, the defendant was ordered to report for induction on April 21, 1970. On April 10, 1970, the defendant requested the Special Form for Conscientious Objectors. On April 17, 1970, the defendant was mailed the Special Form for conscientious objectors (SSS Form 150) and Postponement of Induction Notice (SSS Form 264).

6. On May 22, 1971, the defendant was advised that the Local Board had refused to reopen his classification and retained him in a I-A classification.

7. Subsequently, on November 19, 1971, the defendant refused to submit to induction into the Armed Forces of the United States.

V

ARGUMENT

THE FILING OF A CONSCIENTIOUS OBJECTOR CLAIM SUBSEQUENT TO AN ORDER TO REPORT FOR INDUCTION DOES NOT REQUIRE THE LOCAL BOARD TO REOPEN AND RECONSIDER THE DEFENDANT'S CLASSIFICATION.

The post-induction notice filing of a conscientious objector claim is entitled to no consideration. 32 CFR §1625.2 (1971); Ehlert v. United States, 402 U.S. 99 (1971).

Defendant apparently challenges this proposition on the basis that this case is somehow distinguished from Ehlert, supra, for the reason that (1) the defendant's failure to secure a duplicate Form 100, after having lost his original form, coupled with (2) defendant's erroneous belief that he had been classified as a delinquent effectively prevented him from asserting his conscientious objector status.

Defendant contends, further, that by responding to his untimely request for conscientious object forms and sending him the Special Form for Conscientious Objectors (SSS Form 150) and a Postponement of Induction Notice (SSS Form 264) the Local Board effected a "defacto" reopening. Accordingly, their refusal to reopen without stating the reasons therefore was contrary to United States v. Haughton, 413 F.2d 736 (9th Cir. 1969).

Defendant's theory is wholly unsupported by reason or authority. Surely, it cannot be contended seriously that any action of the Local Board prevented the defendant from asserting his conscientious objector status. On

the contrary, the Local Board expressly advised the defendant that he had been classified I-A and had a right to appeal that classification. No appeal nor any claim to conscientious objector status was received.

In brief, defendant presented nothing to invoke the board's power to reopen and reconsider his classification. United States v. Hand, 443 F.2d 826 (9th Cir. 1971).

Defendant's contention that this case is distinguished due to the fact that it is not one of "late crystallization" is equally devoid of merit (Brief for Appellant at 9). "Under the Ehlert rationale, it makes no difference whether crystallization of the conscientious objections occurred before or after the order for induction." United States v. Hand, supra at 827.

In United States v. Nix, 437 F.2d 746, 747 (9th Cir. 1971) this Court addressed itself rather directly to the contention now raised by the defendant:

This is not a case of a late crystallization of belief after the receipt of notice to report for induction. Rather, it is a case of the late filing of a previously matured conscientious objector's belief. Therefore, the local board was not permitted to reopen Nix's classification. (emphasis supplied) United States v. Uhl, 436 F.2d 773 (9th Cir. 1970; Dugdale v. United States, 389 F.2d 482 (9th Cir. 1968)).

Nix's next contention that the board constructively reopened his classification, is dependant upon our finding that the board could have properly reopened his classification. Since we find that the board had no such authority, we must reject this contention. . . .

Likewise, the Local Board was not permitted to reopen defendant's classification in this case and his post-induction notice claim to conscientious objector status was properly rejected.

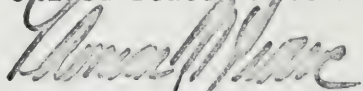
VI

CONCLUSION

Defendant's appeal is without merit. The judgment of conviction should be summarily affirmed.

Respectfully submitted,

WILLIAM C. SMITHERMAN
United States Attorney



THOMAS N. CROWE
Assistant U. S. Attorney
5000 Federal Building
Phoenix, Arizona
Attorneys for Appellee

VII

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

THOMAS N. CROWE, being first duly sworn upon his
oath, deposes and says:

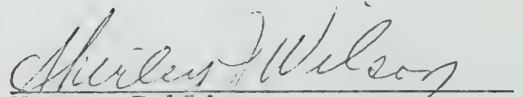
That the foregoing Appellee's Brief has this
2nd day of March, 1972, been mailed to Allen B. Bickart,
1118 Arizona Title Building, 111 West Monroe Street,
Phoenix, Arizona 85003.

DATED: March 2, 1972



THOMAS N. CROWE
Assistant U. S. Attorney

SUBSCRIBED AND SWORN to before me this 2nd day
of March, 1972.


Notary Public

My commission expires
January 11, 1974

